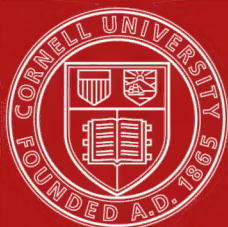


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**SELECT CASES ON TORTS.**

**PART II.**

LA 9295

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LORD ALVANLEY, in summing up to the jury, said, that what the defendant's counsel had stated went to the damages only; that he was aware the late Lord Kenyon had laid down a different doctrine, and had held that such evidence went to the ground of the action itself: he thought differently. He was of opinion that the infidelity or misconduct of the husband could never be set up as a legal defence to the adultery of the wife; that alone which struck him as furnishing any defence was, where the husband was accessory to his own dishonor; he could not then complain of an injury which he had brought on himself and had consented to; but that the wife had been injured by the husband's misconduct, could not warrant her in injuring him in that way, which was the keenest of all injuries. He therefore directed the jury to consider the evidence as going in mitigation of the damages only, and not as furnishing an answer to the action, or as entitling the defendant to a verdict.

*Verdict, £200 damages.*<sup>1</sup>

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### HIGGINS v. BUTCHER.

IN THE KING'S BENCH, TRINITY TERM, 1606.

[*Reported in Yelverton, 89.*]

THE plaintiff declared that the defendant assaulted and beat, &c., one A., his wife, such a day, of which she died such a day following; to his damage, &c. And it was moved by *Foster*, Serjeant, that the declaration was not good, because it was brought by the plaintiff for beating his wife; and that, being a personal tort to the wife, is now dead with the wife: and if the wife had been alive, he could not without his wife have this action; for damages shall be given to the wife for the tort offered to the body of his wife. *Quod fuit concessum.* And by *TANFIELD, J.*, if a man beats the servant of J. S., so that he dies of that battery, the master shall not have an action against the other for the battery and loss of the service, because, the servant dying of the extremity of the battery, it is now become an offence to the Crown, being converted into felony, and that drowns the particular offence and private wrong offered to the master before, and his action is thereby lost. *Quod FENNER and YELVERTON, concesserunt.*<sup>2</sup>

<sup>1</sup> *Rea v. Tucker*, 51 Ill. 110; *Sanborn v. Neilson*, 4 N. H. 501, acc. — Ed.

<sup>2</sup> See *Smith v. Sykes*, Freem. 224. — Ed.

## SAME CASE.

[Reported in *Noy*, 18.]

HIGGINS brought an action of trespass against B., *quare vi et armis insultum fecit* upon the wife of the plaintiff, *et ipsam verberavit, etc., dans ei plagam mortal*, whereof she languished for six months, and died, *ad grave damnum, etc.* By the COURT. That action will not lie, for the king only is to punish felony, except the party brings an appeal. And by TANFIELD, also, that it will not lie, as the case is, because the wife is dead, and that she ought to have joined in the action, but otherwise of a servant. 44 Ass. 13, 43 Edw. III. 23,<sup>1</sup> which seems to the contrary. *Vide* 6 Edw. III. 36.

## SAME CASE.

[Reported in 2 *Rolle's Abridgment*, 575, *placita* 2 and 3.]

If one beat my servant so that I lose his service for some months, and the servant then dies, still I shall have an action of trespass against the trespasser, for this was a distinct trespass to me. Per WILLIAMS, J. But if one beat my wife so that she languishes for some months and then dies, I shall not have an action of trespass against the trespasser afterwards for this trespass, because the trespass was not done to me, but to the wife, so that the wife should have joined in the action, and I only for conformity. *Dubitatur.*

## BAKER v. BOLTON AND OTHERS.

AT NISI PRIUS, CORAM LORD ELLENBOROUGH, C. J., DECEMBER  
8, 1808.

[Reported in 1 *Campbell*, 493.]

THIS was an action against the defendants as proprietors of a stage-coach, on the top of which the plaintiff and his late wife were travelling from Portsmouth to London, when it was overturned; whereby the plaintiff himself was much bruised, and his wife was so severely hurt that she died about a month after in an hospital. The declaration, besides other special damage, stated that, "by means of the

<sup>1</sup> *Cantelow v. Paynel*. Trespass for ravishment of wife. Plea, a subsequent divorce. KNIVET, C. J. "Though the woman were dead, the plaintiff should have his action; so here, though there is a divorce, for he shall have judgment, not that he recover his wife, but damages for the trespass." — ED.











premises, the plaintiff had wholly lost and been deprived of the comfort, fellowship, and assistance of his said wife, and had from thence hitherto suffered and undergone great grief, vexation, and anguish of mind."

It appeared that the plaintiff was much attached to his deceased wife, and that, being a publican, she had been of great use to him in conducting his business. But

LORD ELLENBOROUGH said, the jury could only take into consideration the bruises which the plaintiff had himself sustained, and the loss of his wife's society and the distress of mind he had suffered on her account, from the time of the accident till the moment of her dissolution. In a civil court, the death of a human being could not be complained of as an injury; and in this case the damages as to the plaintiff's wife must stop with the period of her existence.

*Verdict for the plaintiff, with £100 damages.<sup>1</sup>*

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OSBORN v. GILLETT.

IN THE EXCHEQUER, JANUARY 23, 1873.

[Reported in *Law Reports*, 8 *Exchequer*, 88.]

DECLARATION, stating that at the time, &c., and thence until the time of her death, one Elizabeth Osborn was the daughter and servant of the plaintiff; that the defendant, by John Broadwater, his servant, negligently drove a wagon and horses against the said Elizabeth Osborn, whereby she was wounded and injured, and by reason thereof afterwards died; whereby the plaintiff lost the service of the said Elizabeth Osborn, and the benefits and advantages which would otherwise have accrued to him from such service, and was put to expense in conveying to his house the body of the said Elizabeth Osborn, and was afterwards and necessarily put to and incurred expense in preparing for, and in and about and incidental to, the burial of the same.

Pleas: 3. That the said Elizabeth Osborn was killed upon the spot by the acts and matters mentioned in the declaration, so that the plaintiff did and could not sustain any damage which entitles him to sue in this action for the acts complained of.

4. That the acts and matters complained of in the declaration amounted in law to a felonious act by the said John Broadwater committed; and Broadwater, at the commencement of this suit, had not, and has not since, been tried, convicted, or acquitted of, nor in any

<sup>1</sup> Hyatt v. Adams, 16 Mich. 180; Nickerson v. Harriman, 38 Me. 277, acc. — ED.

manner prosecuted for, the said offence, although nothing ever existed to render such prosecution unnecessary, improper, inexpedient, or to entitle the plaintiff to sue in this action without the same having taken place. Demurrer and joinder.

Nov. 13. *Graham*, for the plaintiff. The fourth plea is clearly bad. *White v. Spettigue*<sup>1</sup> established that the rule as to the right of action being suspended by the felony, whatever its extent may be, was, at any rate, not applicable except between the party injured and the criminal himself; and the late case of *Wells v. Abrahams*,<sup>2</sup> in which all the authorities were reviewed, makes the whole rule very questionable. The third plea is also bad. "No question can be raised on this demurrer as to whether there was in reality a service. The declaration alleges it as a matter of fact, and it is a fact which very slight circumstances will suffice to prove. *Evans v. Walton*. No allegation need be made as to the nature of the service. *Martinez v. Gerber*.<sup>3</sup> It is, however, contended that no action can be brought, because the plaintiff's daughter was killed instantaneously. But the plaintiff is not the less damaged because he loses the services of his daughter at once.

[BRAMWELL, B. Are you not entitled to throw the burden of argument on the other side? It is admitted that if the servant lives for six months the master would have had an action. Why has he not one because the servant dies at once? KELLY, C. B. Could an annuitant bring an action for the killing of the *c'estui que vie*? BRAMWELL, B. No; because there is no legal relation between the two.]

The notion that an action cannot be brought in such a case seems to be founded on what is said in *Higgins v. Butcher*; but in that case the action was brought for injuries to the plaintiff's wife, whereby she was killed; and the argument was that the husband could not sue, because in such an action it was necessary to join the wife. No such argument can apply here, for the master cannot join the servant in suing. The servant may sue for the injury done to himself, and to this action the master is no party; the master may sue for loss caused to him by the injury to the servant, and to this the servant is no party. The damages recovered by the one can never be any recompense for the loss sustained by the other. Further, what is said in *Higgins v. Butcher* is very much involved with the question as to the effect of a felony on the power to sue, on which point its authority is shaken by *Wells v. Abrahams*.<sup>4</sup>

*Prentice*, Q. C. The fourth plea is within *Higgins v. Butcher*; but the third plea is, at any rate, good. The maxim applies, *actio perso-*

<sup>1</sup> 13 M. & W. 603.

<sup>3</sup> 3 M. & G. 88.

<sup>2</sup> Law Rep. 7 Q. B. 554.

<sup>4</sup> Law Rep. 7 Q. B. 554.











*nalis moritur cum persona.* The policy of the law refuses to recognize the interest of one person in the death of another, and no instance can be produced of an action having been brought in respect of the death of a person before Lord Campbell's Act. In *Baker v. Bolton* it was laid down by Lord Ellenborough that "in a civil court the death of a human being could not be complained of as an injury; and in this case the damages as to the plaintiff's wife must stop with the period of her existence." This view is in conformity with what was thrown out in *Higgins v. Butcher*, and it has been followed in the American courts in *Eden v. Lexington & Frankfort Ry. Co.*, and in *Carey and Wife v. Berkshire Ry. Co.*, where the earlier case of *Ford v. Monroe* was discussed and dissented from.<sup>1</sup> Lord Campbell's Act (9 & 10 Vict. c. 93) also amounts to a legislative declaration that it is the law that the action dies with the person; if it were not so, the act need not have been passed, nor could it have been truly recited in the preamble that "no action at law is now maintainable against a person who by wrongful act, neglect, or default may have caused the death of another person." The legislature has considered the matter, and has carefully limited the relief which it has provided.

*Graham*, in reply. The plaintiff's interest is not in the death of his servant, but in her life, and of the benefit of this the defendant's act has deprived him. Lord Campbell's Act only had in view the case of the right of action of the person killed, and the persons for whom that statute makes provision are persons who would have had no action in his lifetime for injuries done to him. Neither the statute, therefore, nor the preamble—which has regard only to the matter of the statute—affect this question. At least the plaintiff is entitled to recover for the expense of burial, for he was compellable by law to bury his child. *Reg. v. Vann.*<sup>2</sup> *Cur adv. vult.*

Jan. 23. The following judgments were delivered:—

PIGOTT, B. There are demurrers to the third and fourth pleas in this case. The action is brought for negligent driving by the defendant's servant, whereby Elizabeth, the daughter and servant of the plaintiff, was injured and killed, and in consequence the plaintiff lost her services, and was put to the expense of burying her.

By the third plea the defendant says that she was killed on the spot, and the first question is, whether this plea affords a good defence in law to an action by a master for damage sustained by reason of the death of his servant. It may seem a shadowy distinction to hold that

<sup>1</sup> See Angell on Carriers, § 600.

<sup>2</sup> 2 Den. Cr. C. 325; 21 L. J. (M. C.) 38.

when the service is simply interrupted by accident resulting from negligence the master may recover damages, while in the case of its being determined altogether by the servant's death from the same cause, no action can be sustained. Still I am of opinion that the law has been so understood up to the present time; and if it is to be changed, it rests with the legislature and not with the courts to make the change.

It is admitted that no case can be found in the books where such an action as the present has been maintained, although similar facts must have been a matter of very frequent occurrence. This alone is strong to show that the general understanding had been to the effect laid down by Lord Ellenborough, in 1808, in *Baker v. Bolton*. That was, no doubt, a *nisi prius* decision; but it does not appear to have ever been questioned. The ruling was, that the death of any human being could not be complained of as an injury, — *i.e.*, as an actionable injury; and the law as then laid down has found its way into the various text-books treating upon master and servant. 2 Chitty on Pleading (7th ed.), p. 488, n. There was nothing in that case to show that the negligence amounted to a felony, and, if death is caused without criminal negligence or by merely injudicious driving, it would not.

But, in addition to this authority, and the general acquiescence in it for so many years, there is a clear parliamentary recognition and statement that such is the law to be found in the preamble to Lord Campbell's Act (9 & 10 Vict. c. 93). The language is not confined to cases to which the maxim "*actio personalis moritur cum persona*" applies, but is perfectly general.

"Whereas no action at law is now maintainable against a person who, by his wrongful act, neglect, or default, may have caused the death of another person, and it is oftentimes right and expedient that the wrong-doer in such cases shall be answerable in damages for the injury so caused by him."

The remedy is then given to the deceased's personal representatives for the benefit of wife, husband, parent, and child only. Yet it must be manifest that numerous other cases in which special damages of various kinds are sustained (master and servant being one) must have been present to the mind of the framers of the statute, and, if such had been the intention, an express remedy would have been afforded in cases where proximate special damage resulted from the death so caused.

Several American authorities were also cited which show that the law in America has followed the ruling of Lord Ellenborough (*Eden v. Lexington & Frankfort Ry. Co.*; *Carey and Wife v. Berkshire*











Ry. Co.), but I do not think it necessary to rely upon these. The result is, in my opinion, that we are not at liberty to disregard the law thus established so long ago and expressly recognized by the legislature, nor in effect to add by the decision of this court another clause to Lord Campbell's Act. For these reasons, as regards the loss of service, therefore, I think this action is not maintainable, and the same reason applies also to the expense of the burial.

I think the fourth plea is bad, for the reasons given on the argument; viz., that it only affords a defence, if at all, when the action is brought against the supposed criminal, and before prosecution.

BRAMWELL, B.<sup>1</sup> The fourth plea in this case is clearly bad. *White v. Spettigue*<sup>2</sup> is in point. Indeed, this case is stronger. There the plaintiff was owner of the books, and it may be said it was in some sense his duty to prosecute the man who stole them; but in this case I see no greater duty in the plaintiff than in any one else to prosecute for the supposed felony.

I think the third plea bad also. The declaration shows that the deceased was the plaintiff's servant, that by a wrongful act, for which the defendant is responsible, she was wounded and killed, and that thereby the plaintiff lost her services and sustained damage which may be real and substantial, from the valuable character of the service, prepayment of the wages, or otherwise. The plea admits all this, but says that the wrongful act and death of the servant were at the same moment of time. On this plea it is not alleged that the killing was manslaughter, and as against the defendant it must be taken it was not, for it is not alleged, and there may be a killing under circumstances of sufficient negligence to maintain an action if death had not ensued, though the negligence is not criminal so as to render the killing manslaughter.

Now these pleadings show a state of things such that if the loss of service had arisen from the servant being injured, maimed, crippled, or otherwise disabled from work, but not killed, the action would be maintainable: *Hodsoll v. Stallybrass*;<sup>3</sup> and the only question is, whether the loss arising from a killing makes any difference. It is important to bear this in mind, as it gets rid of all the suggested difficulties about the impolicy of such action being maintainable, and about the unreasonableness of its being maintainable when an annuitant for a man's life could not maintain an action for the wrongful killing of the *cestui que vie*. Because, supposing we could entertain such a consideration, this action is no more against good policy than one would be where the servant was crippled but not killed; and in the supposed case of

<sup>1</sup> This judgment was read by Pigott, B.

<sup>2</sup> 13 M. & W. 603.

<sup>3</sup> 11 A. & E. 301.

the annuitant, he could maintain no action for a wrongful crippling or disabling of the *cestui que vie*, whereby he could not pay the annuity, which, indeed, might have been granted to last during good health. Here a relation is shown to exist between the plaintiff and the servant, in respect of which, if the master sustains damage in consequence of a wrongful act which injures the servant, the law gives the master a right of action; and the only question is, whether to that general rule there is an exception where the servant is killed. I asked why there should be; no reason was or could be given, except the supposed impolicy; but it was said to be a positive rule of law that where a damage was caused by death no action lay. The burden of showing this is on the defendant, who asserts it. He has to make out an exception to a general rule; and as no reason can be given for it, it seems to me to require very clear authority.

Mr. Prentice, for the defendant, relied, first, on the general rule or maxim, "*actio personalis moritur cum persona*." But that clearly means, dies with the person who was to be party to the action as plaintiff or defendant. Dies with the person. What person? It is not any person or every person. If the servant here had lived six months, and during that period service had been lost, this action would clearly be maintainable, though she then died. Further, the maxim is "*actio moritur*," which supposes it was once alive, but here the argument is that the plaintiff never had any action. In effect, the plaintiff's case is, "You killed my servant and caused me loss;" and the defendant's case is the same, "I did kill her, and therefore never was liable." The sense in which I say the maxim is to be understood is that put on it by Mr. Broom and the many authorities he cites in his *Maxims* (5th ed.), p. 904.

Next, Mr. Prentice relied on the recital of 9 & 10 Vict. c. 93, that "no action is now maintainable against a person who by his wrongful acts may have caused the death of another person." And certainly the words are large enough to include this case. But in justice to whomsoever is responsible for it, we ought to see what was the subject-matter being dealt with. When that is done, it will appear manifest that such a case as this was not in contemplation. For (it is somewhat strange) the section proceeds to say that wherever the death of a person shall be caused by a wrongful act, and the act "is such as would (if death had not ensued) have entitled the party injured to maintain an action," there the person who would have been liable if death had not ensued shall be liable, "notwithstanding the death of the party injured," that means killed; so that the death is to make a man liable to an action notwithstanding the death. But that the words "party injured" in the phrase "would have entitled the party











injured" must mean the same as where they again occur, and, therefore, mean "party killed," the present case would be comprehended in this enactment; for the plaintiff is a "party injured." But it is manifest by section 2 that the cases the statute is dealing with are cases where **no** action lay by the representatives of a deceased person to recover damages for his being wrongfully killed, and to this the recital must be limited. Further, with all respect to the legislature and the author of this section, I require stronger authority for the anomaly the defendant contends for than a loose recital in an incorrectly drawn section of a statute, on which the courts had put a meaning from what it did not rather than did say. *Franklin v. South Eastern Ry. Co.*<sup>1</sup>

The next authority relied on was *Baker v. Bolton*. Now, certainly, as reported, it favors the defendant's view, for Lord Ellenborough is reported to have said that "in a civil court the death of a human being could not be complained of as an injury, and in this case the damages as to the plaintiff's wife must stop with the period of her existence." The report is very short, and I am by no means sure of its accuracy. For though the evidence is that the wife assisted in the plaintiff's business, the special damage alleged does not contain any damage to the plaintiff's business, and Lord Ellenborough is reported to have said that the jury could only take into consideration the plaintiff's hurts and the loss of his wife's society and distress of mind till the moment of dissolution. But why was not the plaintiff entitled to recovery for the loss of a month's assistance, and how was he entitled to recover for distress of mind at all? and especially why up to the time when that distress must have become greatest by the death? This is only a *nisi prius* case: the plaintiff got £100, and probably was content. No argument is stated, no authority cited, and I cannot set a high value on that case, great as is the weight of the considered and accurately reported opinions of Lord Ellenborough after argument. The reporter puts a most significant query,<sup>2</sup> Why should the answer to it be "yes," as the defendant contends?

The next authority cited by the defendant is *Higgins v. Butcher*. According to that report the plaintiff showed no damage to himself. He said his wife was beaten and died, to his damage. This shows no pecuniary damage to him. Then Tanfield, J., expresses an opinion which was overruled in *White v. Spettigue*,<sup>3</sup> and which, as it does not give as the reason that death gives no cause of action, may be said by

<sup>1</sup> 3 H. & N. 211, at p. 214.

<sup>2</sup> *Quere.*—If the wife be killed on the spot, is this to be considered *damnum absque injuria*. 1 Camp. at p. 484.

<sup>3</sup> 13 M. & W. 603.

its silence on that to be in defendant's favor. The same case is reported by Noy, who states the declaration, and in that report also no damage to the plaintiff is shown. Then the court say the king is to punish a felony, and Tanfield, J., is stated to have said that the action will not lie because the wife is dead, and she ought to have joined in the action, but otherwise of a servant. This is rather an authority for the plaintiff than the defendant. This case is mentioned by Twisden in *Cooper v. Witham*,<sup>1</sup> as depending on the act being a felony.

The remaining authorities are American, not binding on us, indeed, but entitled to respect as the opinions of professors of English law, and entitled to respect according to the position of those professors and the reasons they give for their opinions. The first case in date is in 1 Cush. 475, a case in the Supreme Court of Massachusetts. In one of the cases there reported, *Skinner v. Housatonic Ry. Corp.*, an action was brought by a father to recover damages for the loss of his son's service, killed by the negligence of the defendants by an act not felonious. In the other case, *Carey and Wife v. Berkshire Ry. Co.*, an action was brought by a widow to recover damages for the death of her husband, killed in like way. It seems strange that the two cases are supposed to present a single question only for the court, while it is obvious that the case of master and servant raises a different question from that of wife and husband. Nor do I understand why the plaintiff in the father's case, unless there was no damage to the father as master, was nonsuited. That looks as though he had not proved some fact, possibly he had not proved damage, for the child was eleven years old only, and it is nowhere said there was any damage. If so, the decision is right. But the judgment is, "If these actions, or either of them, can be maintained, it must be on some established principle of the common law." Now, that is true, and the principle is *injuria* and *damnum*, for which the defendant is responsible. The judgment proceeds, "and we might expect to find that principle applied in some adjudged case in the English books, as occasions for its application must have arisen in many instances. At the least, we might expect to find the principle stated in some elementary treatise of approved authority. None such was cited by counsel, and we cannot find any. This is very strong evidence that such actions cannot be supported." With great respect, the error of this reasoning is in supposing the burden of proof or argument is on the plaintiff. The general principle is in his favor, that *injuria* and *damnum* give a cause of action. It is for the defendant to show an exception to this rule when the *injuria*

<sup>1</sup> 1 Lev. 247.









causes death. If the case had been viewed in this way, the reasons of the court tell for the plaintiff. For in my judgment the exception is not upon any established principle of the common law; it is not applied in any adjudged case in the English books; it is not stated in any elementary treatise. They then cited and relied on *Baker v. Bolton*, on which I have commented. They then cite a case in which the contrary was assumed to be the law by all parties and the court, but suppose it may have passed *sub silentio*.<sup>1</sup> I cannot be satisfied with this decision. The reasoning seems wrong and the authority relied on insufficient.

The other case, *Eden v. Lexington & Frankfort Ry. Co.*, is in the Kentucky Court of Appeal. This was an action by a husband for the negligent killing of his wife. It is obviously, therefore, not in point. There is no relation of master and servant. If the wife had lived, she must have joined in the action, except to the extent of the husband's pecuniary loss for medicine, &c. But in the judgment the case of master and servant is mentioned. I do not very clearly understand it. The first position was, that the rule that no action lies for a felonious act before prosecution does not prevail in Kentucky. The second is this: "But, according to the principles of the common law, injuries affecting life cannot in general be the subject of a civil action. In other inferior felonies the civil remedy is merely suspended until after the conviction or acquittal of the supposed felon. But for injury to life the civil remedy is considered as being entirely merged in the public office." This was said to be the established common-law doctrine in the case of *Baker v. Bolton*. It is true Lord Ellenborough is reported to have said that in a civil court death could not be complained of as an injury. But there is nothing else to justify the above opinion, and if this is the authority, *White v. Spettigue*<sup>1</sup> shows its inapplicability here. The judgment proceeds: "The cause of action for injuries to the person dies with the person injured, and it follows as a necessary consequence that, the cause of action having itself abated, no separate action can be maintained for such damages as are exclusively consequential." I have dealt with this argument before. It is this: "Wrongful death which causes a damage gives no action, because it is death which causes it." The judgment proceeds to say, "that damages may be recovered up to the time of death, but not beyond." The reason of this seems to be that all injuries affecting life caused by the misconduct of another person involve the commission of a public wrong, which merges the remedy for all private loss arising after death has occurred and occasioned by it. Why every death caused by mis-

<sup>1</sup> 13 M. & W. 603.

conduct is to be assumed to be a public wrong I know not. The misconduct may be actionable, though not criminal negligence. Nor do I know why, however this may be, the remedy for private loss should merge in it.

I do not like criticising a variety of authorities, and escaping from their general effect by a variety of small differences and objections. But in this case it seems to me that the principle the plaintiff relies on is broad, plain, and clear; viz., that he sustained a damage from a wrongful action for which the defendant is responsible; that the defendant, to establish an anomalous exception to this rule, for which exception he can give no reason, should show a clear and binding authority, either by express decision, or a long course of uniform opinion deliberately formed and expressed by English lawyers or experts in the English law. I find neither. With the exception of a short note of the case of *Baker v. Bolton*, there is no semblance of an authority on this side of the Atlantic, and the cases from the other side are merely founded on that one, and some vague notion of merger in a felony. I may observe that Mr. Smith, in his excellent work on Master and Servant (3d ed.), p. 139, assumes as certain that this action would lie.

On the main question, then, I think the plaintiff entitled to judgment; but it seems to me clear that he is entitled to the burial expenses. He says in his declaration that he necessarily incurred expenses in the child's burial. This must be taken to be true, if it can be. Now, *Reg. v. Vann*<sup>1</sup> shows he was bound to bury the child if he had the means, which he may have had. On this the judgment in the case of *Eden v. Lexington & Frankfort Ry. Co.* is express; so also in *Baker v. Bolton*, the plaintiff recovered for loss up to the wife's death. In my opinion the plaintiff is entitled to judgment.

KELLY, C. B. I think the defendant is entitled to the judgment of the court upon the demurrer to the third plea. No decision is to be found in the books from the earliest times by which an action for this cause has been sustained. No *dictum* is to be found by any judge or upon any competent authority that such an action is maintainable. All the authority that exists is against it. *Higgins v. Butcher* shows that a husband cannot maintain an action against one who kills his wife; and (by Tanfield, J.) a master has no action against one who kills his servant, though he loses his services. Here, however, the decision proceeds on the ground that the act is a felony; but upon this it may be observed that so would be the killing in the case before the court if the act be such that the negligence makes it amount to man-

<sup>1</sup> 2 Den. Cr. C. 325; 21 L. J. (M. C.) 39.











slaughter. In *Baker v. Bolton* the facts are loosely stated, but they seem to show that the action is founded on negligence, and that the plaintiff had been deprived of the assistance, which may mean the services, of his wife. But the decision did not proceed on the ground that the killing was a felony, Lord Ellenborough observing, without any qualification, that, "in a civil court the death of a human being could not be complained of as an injury." Then we have the American cases, *Carey and Wife v. Berkshire Ry. Co.*, and *Skinner v. Housatonic Ry. Corp.*, deciding that no action for loss of services is maintainable where death has been inflicted through carelessness. The case of *Ford v. Monroe*, the point not having been taken, and being a *nisi prius* case, is of no authority. Finally, we have the express declaration of the legislature in Lord Campbell's Act, that no action lies for damages sustained by the death of a human being, and the language of the preamble shows that it was intended to include more than is provided for by the operative enactments of the statute. Such, then, being the state of the authorities, I agree with my brother Pigott that we must leave it to the legislature to provide for a case like this, and that we ought not to take upon ourselves to create a new cause of action, which would be to make and not to expound the law.

*Judgment for the defendant on the demurrer to the third plea ;  
for the plaintiff on the demurrer to the fourth plea.*

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### CROSS v. GUTHERY.

SUPREME COURT OF ERRORS, CONNECTICUT, FEBRUARY TERM, 1794.

[*Reported in 2 Root, 90.*]

ACTION of the case declaring that on the 10th of October, 1791, the plaintiff's wife had a scrofulous humor in one of her breasts, which required amputation; that the defendant, who then was, and for many years before had been, a practising physician, and professed to be well skilled in surgery, and in the amputation of limbs, applied to the plaintiff and affirmed to him that he had competent skill and knowledge to cut off his wife's breast, and to make a cure of it, and that he could and would for a reasonable reward perform said operation with skill and safety to his said wife; and the plaintiff, relying upon the defendant's declarations aforesaid, consented to his performing said operation, and agreed to pay him therefor whatever should be a reasonable compensation; and the defendant in consideration thereof undertook and promised to perform said operation with skill and

safety to the wife of the plaintiff; and that on the 10th of October aforesaid, the defendant did cut off the breast of his said wife, and performed said operation in the most unskilful, ignorant, and cruel manner, contrary to all the well-known rules and principles of practice in such cases; and that after said operation the plaintiff's wife languished for about three hours, and then died of the wound given by the hand of the defendant; and that the defendant had wholly broken and violated his undertaking and promise to the plaintiff to perform said operation skilfully and with safety to his wife; whereby the plaintiff had been put to great cost and expense, and been deprived of the service, company, and consortium of his said wife. Damage, £1000.

The defendant pleaded in bar that on the 21st of October, A.D. 1791, the plaintiff owed the defendant £15 on book for doctoring his wife, and the plaintiff demanded damages for the injury complained of in the declaration, whereupon they mutually agreed to offset said claims the one against the other; and the defendant discharged the plaintiff from said book debt, and the plaintiff accepted the same in full satisfaction of said accord and of the injury complained of in the declaration.

This plea was traversed by the plaintiff; on which the parties were at issue to the jury. The jury found that it was not accorded and agreed, &c., as the defendant in his plea in bar had alleged, and found for the plaintiff to recover £40 damage and his cost.

The defendant then moved in arrest of judgment, that the declaration and matters therein contained were insufficient to render a judgment upon. The exception taken to the declaration by the counsel for the defendant was that the offence charged appeared to be a felony, and by the laws of England the private injury was merged in the public offence.

By THE COURT. The declaration is sufficient. The rule urged by the defendant is applicable in England only to capital crimes, where from necessity the offender must go unpunished, or the injured individual go unredressed.<sup>1</sup>

<sup>1</sup> See *Lynch v. Davis*, 12 How. Pr. 323. — Ed.











## NASH v. PRIMM.

SUPREME COURT, MISSOURI, APRIL TERM, 1822.

[Reported in 1 Missouri Reports, 125.]

PER CURIAM. In this case the declaration alleges that the defendant, with force and arms, shot and killed a negro slave of the plaintiff's. After verdict, the defendant moved in arrest of judgment, "that the plaintiff could not recover in this action, because, by the killing of the slave in question, the private injury to the owner is merged and swallowed up in the public offence." The Circuit Court sustained the motion, and the question to be decided by this court is, whether the judgment was properly arrested. In general, the law provides a remedy for every injury. The only inquiry, then, is, whether, in cases where the injury amounts to felony, the party injured is barred of his remedy. In the case of *Crosby v. Leng*,<sup>1</sup> it was held that, after verdict of acquittal, upon an indictment for a felonious assault, the party injured may maintain a civil action for damages; and it was said by Lord Ellenborough in that case that, after a verdict, either of conviction or acquittal, in a criminal prosecution, the party injured by any felonious act can seek civil redress for it. It was likewise decided in the case of *Smith v. Weaver*,<sup>2</sup> that, after acquittal on an indictment for killing a slave, the owner may maintain trespass. These cases show that the civil remedy is not barred, but suspended, until the justice of the country shall be satisfied. Whether the policy of our law requires such suspension of individual remedy need not now be decided, as the plaintiff in this case shows a good cause of action, and the question of prosecution is not made in the cause; if it arose on the trial, it was not made the subject of exception; and as the declaration is sufficient, and the presumption of the law is, that the plaintiff proved on the trial all that was necessary to enable him to recover,

The judgment of the Circuit Court must therefore be reversed, with costs, the cause remanded, and the Circuit Court directed to render judgment on the verdict of the jury for the plaintiff.<sup>3</sup>

<sup>1</sup> 12 East, 409.

<sup>2</sup> 1 Tayl. 58.

<sup>3</sup> *Williams v. Fambro*, 30 Ga. 232; *Thompson v. Young*, 30 Miss. 17; *Smith v. Weaver*, 1 Tayl. 58; *White v. Chambers*, 2 Bay, 70; *Greer v. Emerson*, 1 Tenn. 12; *Hedgepeth v. Robertson*, 18 Tex. 858, acc. — ED.

## FORD v. MONROE.

SUPREME COURT OF JUDICATURE, NEW YORK, OCTOBER, 1838.

[Reported in 20 Wendell, 210.]

THIS was an action on the case, tried at the Saratoga circuit in May, 1833, before the Hon. Esek Cowen, then one of the circuit judges.

The declaration charged that by the negligence of a servant of the defendant in driving a gig, a son of the plaintiff of the age of about ten years was run over and killed. In one of the counts it was alleged, by way of special damage, that in consequence of the occurrence, the wife of the plaintiff became sick, and remained so for a long time, and that the plaintiff was not only deprived of her society, but was subjected to great expense in attendance upon her and in effecting her recovery; and in another of the counts, the damage alleged was the loss of the service of the child for a period of ten years and upwards. The happening of the accident and the sickness of the plaintiff's wife as alleged in the declaration were proved. The judge instructed the jury that the only question in the case was, whether the servant had been guilty of negligence; that if they should find that he was chargeable with negligence, that then the plaintiff would be entitled to recover such sum by way of damages as they should be of opinion the service of the child would have been worth to him until he became twenty-one years of age; and also that he was entitled to recover the damages occasioned by his wife's sickness, consequent upon the accident. The jury found a verdict for the plaintiff, with \$200 damages. The defendant moved for a new trial.

*N. Hill, Jr.*, for the plaintiff. *W. L. F. Warren*, for the defendant.

By the court, NELSON, C. J. The main ground urged in support of the application for a new trial is, that the proof failed to establish that the servant was acting in the business of the master, or within the scope of his authority. The answer to which is, that the point was not made upon the trial, neither in the motion for a nonsuit, or after the testimony had closed. The cause seems to have been tried and defended upon the assumption of the existence of the relation of master and servant between the defendant and the person driving the carriage. Had the objection been taken, more full proof might have been called out, so as to have placed the question beyond doubt. If the point had been put forth in due season, as the evidence stands, the judge would have been bound to have submitted it to the jury, and their verdict would have been well warranted. It would therefore be unreasonable to disturb the verdict upon the ground now











urged, as the counsel did not choose to avail himself of it when it could have been removed by his adversary by the production of further proof, or met by going to the jury upon that already given.

The damages were specially laid in the declaration, and were clearly proved to have been the direct consequence of the principal act complained of; they therefore came within the well-settled rule respecting special damage.

*New trial denied.*

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CAREY AND WIFE v. THE BERKSHIRE RAILROAD COMPANY.

SKINNER v. THE HOUSATONIC RAILROAD CORPORATION.

SUPREME JUDICIAL COURT, MASSACHUSETTS, SEPTEMBER TERM, 1848.

[*Reported in 1 Cushing, 475.*]

THE first of the above-named actions was originally commenced by Eliza Ann Hewins, then the widow of Joseph H. Hewins, and is now prosecuted in the joint names of herself and Lockwood Carey, with whom she has since intermarried. It was an action on the case, to recover damages for the loss of the life of the female plaintiff's late husband, in consequence of the negligence, carelessness, and unskilfulness of the defendants' servants and agents.

On the trial, which took place in the Court of Common Pleas before Wells, C. J., at the October term, 1845, the plaintiff (Eliza Ann Hewins, then sole) offered to prove, among other things, that on the day of the alleged injury Hewins was employed by an agent of the defendants, with other laborers, to go on the defendants' road, southerly of the station at West Stockbridge, as far as the north part of Great Barrington, to shovel snow from the track, in order that the trains might proceed; that he was employed as a day laborer, and to be paid by the day, and was not constantly employed by the company under any contract; that, on the day referred to, Hewins was engaged to clear snow from the track, until a car should be sent down to bring him and the other laborers back, and was directed to remain at work until he should be thus sent for; that this arrangement to bring back the laborers by the cars was made, in order that they might have a longer time to work; that, at evening, the cars were sent accordingly, and Hewins, and the other laborers, who were then at work several

miles below, were taken on board the cars and brought back to the station at West Stockbridge; that, when the cars were approaching the station, and making arrangements to run into the place appropriated to them, they were, in consequence of the carelessness and inattention of the switch-tender, directed towards and carried to the engine-house, the doors of which were closed; that the cars ran against the doors of the engine-house, stove them in pieces, and entered the house; that the engine was behind the cars, pushing or backing them up on the track and against the doors of the engine-house; that the cars were open or freight cars, and Hewins was sitting on the floor of one of them; that the engineer, seeing the danger, directed those in the cars to clear themselves therefrom; that Hewins, before he could thus clear himself, was thrown from the car in consequence of its striking the door of the engine-house; that, on being thrown off, he fell between the tender and the car, and was run over, and so severely injured and bruised, that he died of his wounds in eighteen or twenty hours afterwards; that Hewins's death was occasioned solely by the injuries so received; that he was the husband of the plaintiff, who was poor; and that, by his death, she was left to provide for herself and the support of three small children.

The judge being of opinion that, if the facts stated were proved, they would not entitle the plaintiff to recover, a verdict was thereupon rendered for the defendants, and the plaintiff filed exceptions.

*I. Sumner*, for the defendants. *W. H. Bishop*, for the plaintiffs.

The second of the above-named actions was also an action on the case, brought by the plaintiff for the loss of service of his son, aged about eleven years, who was killed by the cars of the defendants on the 24th day of February, 1847.

At the trial, which was in this court, before Dewey, J., the plaintiff proposed to prove, in order to entitle himself to a verdict, that the death of his son was caused by an accident which took place on the defendants' railroad, by reason of the carelessness or fault of the servants and agents of the defendants.

The case was taken from the jury, by consent, and reserved for the consideration of the whole court, upon the report of the judge.

*J. Rockwell* and *H. Wheeler*, for the plaintiff. *I. Sumner*, for the defendants.

These cases were separately argued, but, presenting a single question only for the consideration of the court, they were both embraced in the same opinion.

METCALF, J. These actions raise a new question in our jurisprudence. No case was cited at the argument in which a like action had been the subject of adjudication, or even of discussion. The case of









Higgins v. Butcher was referred to, where there is a *dictum* of Tanfield, J., in which Fenner and Yelverton, JJ., are said to have concurred, that, "if one beat the servant of J. S., so that he die of that beating, the master shall not have an action against the other for the battery and loss of service, because the servant dying of the extremity of the beating, it is now become an offence against the Crown, and turned into felony, and this hath drowned the particular offence, and prevails over the wrong done to the master, and his action by that is gone." This doctrine is also found in most of the Digests and Abridgments of the English law. But whatever may be the meaning or legal effect of the maxim, that a trespass is merged in a felony, it has no application to the cases now before us. In neither of them was the killing felonious, and there is, therefore, no felony in which a private injury can merge.

If these actions, or either of them, can be maintained, it must be upon some established principle of the common law. And we might expect to find that principle applied in some adjudged case in the English books, as occasions for its application must have arisen in very many instances. At the least, we might expect to find the principle stated in some elementary treatise of approved authority. None such was cited by counsel, and we cannot find any. This is very strong evidence, though not conclusive, that such actions cannot be supported. But it is not necessary to rely entirely on this negative evidence. For we find it adjudged, in *Baker v. Bolton and Others*, that the death of a human being is not the ground of an action for damages. In that case, the plaintiff brought an action against the proprietors of a stage-coach, which was overturned while he and his wife were travelling in it, whereby he was much bruised, and his wife so severely hurt that she died about a month after. The declaration alleged, besides other special damage, that, "by means of the premises, the plaintiff had wholly lost and been deprived of the comfort, fellowship, and assistance of his said wife, and had from thence hitherto suffered and undergone great grief, vexation, and anguish of mind." Lord Ellenborough held that the jury could take into consideration only the bruises which the plaintiff had sustained, and the loss of his wife's society, and the distress of mind he had suffered on her account, from the time of the accident to the time of her death. And he announced the principle of his decision in these words: "In a civil court, the death of a human being cannot be complained of as an injury." Such, then, we cannot doubt, is the doctrine of the common law; and it is decisive against the maintenance of these actions.

We are aware of the case of *Ford v. Monroe*, in which the plaintiff, in an action tried before Cowen, J., recovered damages for the negligence

of the defendant's servant in driving a carriage over the plaintiff's son, ten years old, and thereby killing him. One ground of damage alleged in the declaration was the loss of the son's service for the period of eleven years; and the jury were instructed that the plaintiff was entitled to recover such sum as the service of the son would have been worth until he became twenty-one years of age. The case went before the whole court on a motion for a new trial; but no question was there raised concerning the legal right of the plaintiff to recover damages caused by the killing of his son. For aught that appears in the report, that point was assumed, and passed *sub silentio*, both at the trial and *in banc*.

The English Parliament, by a very recent statute (9 & 10 Vict. c. 93), have provided, that whenever the death of a person shall be caused by a wrongful act, neglect, or default, which would, if death had not ensued, have entitled the party injured to maintain an action to recover damages in respect thereof, the person who would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured shall have been caused under such circumstances as amount in law to felony; such action to be brought within twelve calendar months after such death, by and in the name of the executor or administrator of the person deceased, and to be for the benefit of the wife, husband, parent, and child of the persons whose death shall have been so caused; and in such action the jury may give such damages as they may think proportioned to the injury resulting from such death, to the parties respectively for whose use such action shall be brought. And by our Stat. of 1840, c. 80, if the life of any passenger shall be lost by the negligence or carelessness of the proprietors of a railroad, steamboat, stage-coach, &c., or of their servants or agents, such proprietors shall be liable to a fine not exceeding five thousand dollars, nor less than five hundred dollars, to be recovered by indictment, to the use of the executor or administrator of the deceased person, for the benefit of his widow and heirs.

These statutes are framed on different principles, and for different ends. The English statute gives damages, as such, and proportioned to the injury, to the husband or wife, parents and children, of any person whose death is caused by the wrongful act, neglect, or default of another person, adopting, to this extent, the principle on which it has been attempted to support the present actions. Our statute is confined to the death of passengers carried by certain enumerated modes of conveyance. A limited penalty is imposed, as a punishment of carelessness in common carriers. And as this penalty is to be recovered by indictment, it is doubtless to be greater or smaller,











within the prescribed maximum and minimum, according to the degree of blame which attaches to the defendants, and not according to the loss sustained by the widow and heirs of the deceased. The penalty, when thus recovered, is conferred on the widow and heirs, not as damages for their loss, but as a gratuity from the Commonwealth.

We believe that by the civil law, and by the law of France and of Scotland, these actions might be maintained. If such a law would be expedient for us, it is for the legislature to make it.

In the first of these actions, the exceptions are overruled; in the second, the plaintiff is to be nonsuit.

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## EDEN *v.* LEXINGTON AND FRANKFORT RAILROAD COMPANY.

COURT OF APPEALS, KENTUCKY, SUMMER TERM, 1853.

*[Reported in 14 B. Monroe, 204.]*

THE only question, and it is an important one, that arises in this case is, whether the husband, whose wife has been killed on a railroad by a collision, produced by the carelessness and misconduct of the agents who were managing and directing the running of the locomotive and cars at the time, can maintain an action against the company for the injury sustained by him in consequence of the death of his wife.

The facts alleged to sustain the action are, that the wife of the plaintiff, who was riding in a carriage, in passing over the railroad, on a public highway with which it was intersected, was killed instantly by the locomotive and cars running against the carriage; that the collision resulted from the carelessness and negligence of the defendant's agents who were conducting the train at the time, and from the failure of the defendants themselves to use, or to require their agents to use, in approaching the intersection of the roads at that point, such precautionary measures as prudence dictated, and such as were essentially necessary to the safety of those persons who might be travelling on this public highway.

The Circuit Court having decided, upon a demurrer filed by the defendant, that the action could not be maintained, the plaintiff has prosecuted a writ of error to reverse the judgment of that court.

Two grounds have been assumed in argument in support of the judgment: 1. That the killing, if it occurred in the manner alleged by the plaintiff, was in law a felony, and it is a rule of the common law that,

before the party injured by any felonious act can seek civil redress for it, the matter should be heard and disposed of before the proper criminal tribunal, which has not been done in the present case. 2. According to the well-settled doctrine of the common law, the loss of human life cannot be complained of as a civil injury. That such an action can only be maintained where it is expressly authorized by a statute, and as we have no statute on the subject, the plaintiff's right to the action must be denied, as it has to be determined by common-law principles.

1. At common law, a party injured by an act which is felonious cannot seek civil redress for it until the matter has been investigated and disposed of before the appropriate tribunal. The avowed object of the rule is to prevent the criminal justice of the country from being defeated, and consequently, after a verdict and judgment either of acquittal or conviction, this rule, which is founded upon the general policy of the law, has no further operation.

The existence of this rule has not been recognized in this State. In the case of *Williams v. Hedricks*,<sup>1</sup> it was expressly repudiated as having been based on a mistaken policy, and the court held that reason and justice alike dictate that for every civil injury compensation should be made; and that when a person committed a criminal offence, he was not only liable to a prosecution for the public wrong, but also to an action for the civil injury. This rule has also been changed by express legislation. By the Revised Statutes it is enacted (chap. 28, § 4) that "the commission of a felony shall not stay or merge any civil remedy of the party aggrieved against the felon." This statutory provision, it is true, does not have any effect upon the decision of the questions arising in this case, because the suit was commenced before the Revised Statutes took effect; but we regard this enactment as merely declaratory of the law as it had been settled and expounded by this court, and not as changing an existing rule of law, which the legislature deemed it proper to alter.

2. But according to the principles of the common law, injuries affecting life cannot, in general, be the subject of a civil action. In other inferior felonies the civil remedy is merely suspended until after the conviction or acquittal of the supposed felon; but for injuries to life, the civil remedy is considered as being entirely merged in the public offence. This was said to be the established common-law doctrine in the case of *Baker v. Bolton*. There the husband and wife were riding on the top of the stage which overset, and the wife was so injured that she died; the action was brought by the husband for the loss of society, &c., and Lord Ellenborough held that there could be no recovery for

. <sup>1</sup> Printed Decisions, 203.











distress of feeling and loss of society, &c., except from the moment of the injury to the wife up to the time of her death.

The cause of action for injuries to the person dies with the person injured, and it follows as a necessary consequence that, the cause of action having itself abated, no separate action can be maintained for such damages as are exclusively consequential. But for aggravated injuries to the person of the wife or child the husband or parent has an independent and separate cause of action for the loss of the society of the wife, or the services of the child, as the case may be. This cause of action does not abate by the subsequent death of the wife or child, but the death of either affects the extent of the recovery, as by that event all further claim to the society of the one, or the services of the other, ceases and determines. And the rule still prevails, although the death that produces this effect results from the same injury which gives rise to the action. The reason of this seems to be, that all injuries affecting life, caused by the misconduct of another person, involve the commission of a public wrong, which merges the remedy for all private loss, arising after death has occurred, and occasioned by it. Consequently the death of the person injured has precisely the same effect on the civil remedy, whether it results from the injury inflicted or from natural causes. In either case the estimate of damages stops at the moment of death.

It was decided in New York that where a child has been killed by the wilful or negligent conduct of a third party, the parent has a right to recover not only for the lost services of the child, but also for the expenses attending the sickness of the wife, produced by the shock which the death occasioned to her feelings. 20 Wend. 210. But in a later case it has been decided, in the same State, that such third party is only liable to the amount of the medical charges and the funeral expenses of the child. 3 Comst. 489. A similar decision has been given in Massachusetts. 1 Cush. 475. And in the latter State it has been held that an action cannot be maintained by a father to recover damages for the loss of his child, in consequence of the death of the child, occasioned by the carelessness or fault of the agents or servants of a railroad corporation.

The law on this subject has been lately changed in England by statute, and now, in that country, the person who would have been liable, if death had not ensued, is liable to an action for damages notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony. An act has been passed by the legislature of Massachusetts on the same subject, and also, we believe, by the States of New Hampshire and Connecticut. In this State the common-law doctrine has not been altered.

The injury complained of in this case is the loss of the society of the wife, and of her assistance in the management of the husband's domestic affairs. According to the existing law there can be no recovery for this injury, inasmuch as the death of the wife was instantaneous, and it is only for the loss that is sustained by the husband in this respect, from the moment of the injury up to time of the death of the wife, for which any recovery can be had.

Wherefore the judgment is affirmed.

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SHIELDS v. YONGE.

SUPREME COURT, GEORGIA, APRIL TERM, 1854.

[*Reported in 15 Georgia Reports, 349.*]

THIS was a suit by George Shields, against George Yonge, as superintendent of the Western & Atlantic Railroad, for the death of a minor son of the plaintiff, caused by the negligence of employes of the Western & A. R. R. One count in the declaration alleged that the son was upon the train as a passenger, by contract for safe-carrying, with the father. Another count alleged that he was employed on the train as a fireman, by contract with the father. The damages alleged were, loss of service until the son arrived at the age of twenty-one years; loss of service during the one hour during which the boy survived after the accident occurred; and a special damage, by reason of the grief to the mother, causing an attack of sickness, and consequent loss of service to the plaintiff.

On motion, the presiding judge nonsuited the plaintiff, on the ground that there was no good cause of action set forth in the declaration.

This decision is assigned as error.

*Wright and Johnson*, for plaintiff in error. *Akin and Underwood*, for defendant in error.

By the court, BENNING, J., delivering the opinion. Is either count in the declaration good? In *Baker v. Bolton and Others*, Lord Ellenborough is reported to have used these words: "In a civil court the death of a human being could not be complained of as an injury." No authority is cited for this opinion. In *Comyns's Digest*, Trespass, B, 5, it is said, "So it (trespass) lies by a master, for the battery of a servant, *per quod*, &c., after the death of the servant;" and 2 Roll. 568, L, 42, is cited. On the contrary, in *Bacon's Abridgment*, Master and Servant, O, it is laid down that "if a man beats another's servant to











that degree that he dies thereof, the master loses his action, and must proceed by indictment, for the private injury to him is drowned in the general injury to the public;" and for this is cited, among other authorities, the same, 2 Roll. Abr. 568. Rolle's Abridgment itself is not within my reach; and, therefore, I cannot find out which position it supports,—that of Bacon or that of Comyns. Let it be admitted, however, that Rolle's Abridgment supports the position of Bacon, and that that position is right, what, then, does that position amount to? Blackstone, it is conceived, answers this question.

Blackstone says, "In all cases, the crime includes an injury,—every public offence is also a private wrong, and somewhat more,—it affects the individual, and it likewise affects the community." "Murder is an injury to the life of an individual; but the law of society considers, principally, the loss which the State sustains, by being deprived of a member, and the pernicious example thereby set for others to do the like. Robbery may be considered in the same view,—it is an injury to private property; but were that all, a civil satisfaction, in damages, might atone for it. The public mischief is the thing, for the prevention of which our laws have made it a capital offence. In these gross and atrocious injuries the private wrong is swallowed up in the public. We seldom hear any mention made of satisfaction to the individual, the satisfaction to the community being so very great. And, indeed, as the public crime is not otherwise avenged than by forfeiture of life and property, it is impossible afterwards to make any reparation for the private wrong, which can only be had from the body or goods of the aggressor. But there are crimes of an inferior nature, in which the public punishment is not so severe; but it affords room for a private compensation also. And herein the distinction of crimes from civil injuries is very apparent. For instance, in the case of battery or beating another, the aggressor may be indicted for this, at the suit of the king, for disturbing the public peace, and be punished criminally, by fine and imprisonment; and the party beaten may also have his private remedy, by action of trespass, for the injury which he in particular sustains, and recover a civil satisfaction in damages." 4 Black. Comm. 6.

According to this, in "gross and atrocious injuries the private wrong is swallowed up in the public," but is not "in crimes of an inferior nature." What is meant by gross and atrocious injuries? Those which are "avenged by forfeiture of life and property," or, perhaps, by forfeiture of property only. Those certainly are meant which are avenged by such a forfeiture as renders it "impossible afterwards to make any reparation for the private wrong;" and a forfeiture of property only is such a forfeiture as does this.

What "injuries" are those which are so avenged? All of the degree of felony. "Felony, in the general acceptation of our English law, comprises every species of crime which occasioned, at common law, the forfeiture of lands and goods." 4 Black. Comm. 94. And, as to felonies, Blackstone also says: "Not only all offences now capital are in some degree or other felony, but that this is likewise the case with some other offences, which are not punished with death: as suicide, where the party is already dead; homicide, by chance-medley or in self-defence; and petit larceny or pilfering,—all which are (strictly speaking) felonies, as they subject the committer of them to forfeitures." Speaking, again, of homicide, "by misadventure and self-defence," he says, "The penalty inflicted by our laws is said, by Sir Edward Coke, to have been, anciently, no less than death; which, however, is, with reason, denied by later and more accurate writers. It seems rather to have consisted in a forfeiture, some say, of all the goods and chattels" (*i. e.*, of all that, at common law, could be reached for satisfaction of a debt); "others of only a part of them, by way of fine or weregild. But the delinquent has now, and has had, as early as our records will reach, a pardon and writ of restitution of his goods, as a matter of course and right. And, indeed, to prevent this expense, in cases where the death has notoriously happened by misadventure or in self-defence, the judges will usually permit (if not direct) a general verdict of acquittal." *Ib.* 188.

The amount of this is, that anciently homicide, even by misadventure or in self-defence, was a felony; and that "now" it is no crime at all,—now it is "excusable." And this is the same as saying that by the English law all homicide is, and has always been, either felonious or innocent; as saying that there neither is, nor has been, any intermediate kind, that may rank as a misdemeanor. Indeed, his division of homicide is into three kinds,—justifiable, excusable, and felonious; and in making this division he places homicide by misadventure and in self-defence under the head of "excusable." By the ancient law, it would have been to be placed under the head of felonious; since it has got to be excusable, it may, without impropriety, be said to have become innocent; that is to say, to have become a sort of homicide that is not an injury of any kind, either public or private.

When, therefore, Blackstone says, that in "gross and atrocious injuries the private wrong is swallowed up in the public," he in effect says that the private wrong is so swallowed up in all homicides that are injuries,—for all homicides that are injuries at all are injuries which amount to felonies; and in all felonies the private wrong is so swallowed up.

But how "swallowed up"? What does he mean by these words?









Does he mean that the private injury is merged in the public, so as to be for ever gone; or does he mean that it is merely merged for a time,—that it is only suspended until the public injury shall have been avenged? Manifestly he means the latter; for he puts the proposition, that after reparation has been made for the public wrong, no reparation is to be made for the private wrong; not upon the ground that no reparation is then due for that private wrong, but upon the ground that it is practically impossible that reparation for it should be made,—all out of which reparation could be made having already been used up in making reparation for the public wrong; all having gone in forfeiture to the public. This is the same as saying, that if, after reparation is made to the public, there is any thing left, out of which reparation may be made to the private man, he will be entitled to reparation,—that is, that the private man has a right to reparation, after reparation to the public; but that, practically, this right is nugatory, as reparation to the public consumes all that he who is to make reparation has.

Now, that this swallowing up of the private injury in the public, means, with respect to all injuries other than homicides, this sort of suspension merely of the private injury, is well established. Hale says, “By course of common law, A. steals the goods of B., viz., fifty pounds in money; A. is convicted and hath his clergy, upon the prosecution of B. B. brings a trover and conversion for this fifty pounds, and upon not guilty pleaded, this special matter is found and adjudged for the plaintiff, because now the party hath prosecuted the law against him, and no mischief to the Commonwealth; but it was held that, if a man feloniously steal goods, and before prosecution by indictment the party robbed brings trover, it lies not, for so felonies should be healed.” 1 Hale, P. C. 546. To the same effect are *Crosby v. Leng*; <sup>1</sup> 1 Chitty, Cr. Law, 5.

Be the reasons for allowing a suit for the private injury, after the accomplishment of a suit for the public injury, what they may, they are plainly as applicable to injuries by homicide as to any other felonious injuries; that is to say, in all cases in which the maxim of, *actio personalis moritur cum persona* does not govern. This maxim cuts off the right of suit by the party killed and his representatives, but not that of his master, if he has one. But in the case of the manslaughter of a man's servant, why should not the man, after he has prosecuted the offender to conviction, and done his whole duty to the public, be allowed to sue for his private redress, in the same manner as those who have been robbed are, after they prosecute the robber to conviction, allowed to sue for their private redress? There seems to

<sup>1</sup> 12 East, 409; 17 Ves. 327.









This is the English rule with respect to misdemeanors; and this Georgia has adopted. This, therefore, is the rule applicable to homicides of the degree of misdemeanors; that is to say, to homicides which are involuntary manslaughters, in the performance of a lawful act, "where there has not been observed necessary discretion and caution."

And of this degree of homicide is the homicide described in the declaration. That homicide is alleged to have been occasioned by the negligence of the superintendent of the railroad, Wadley, whilst conveying the son of the plaintiff over the railroad; that is, whilst in the performance of a lawful act. If this allegation is true, Wadley was guilty of involuntary manslaughter, in the performance of a lawful act; that is to say, was guilty of a misdemeanor, and not of a felony.

1. It follows, therefore, that the private injury which resulted from the homicide was not merged in the public injury, or suspended until after that had been avenged.

This being so, did this plaintiff, the father of the minor son killed, sustain that private injury, or any part of it? Is the right in him to prosecute this suit?

The first count in the declaration alleges that Wadley, the superintendent, received into the cars, &c., "William Shields, the son and servant of the plaintiff, an infant of the age of eighteen years, as a passenger, &c., to be carried," &c.; and that by the negligence of Wadley, the cars, &c., ran off the track, whereby William Shields was so greatly injured as to die of his injuries within an hour.

2. May a father treat his minor son as his servant, and sue for an injury to the son, as for an injury to a servant? If the son be old enough to render service, the father may. *Flemington v. Smithers*; <sup>1</sup> *Hall v. Hollander*; *Smith, Master and Servant*, 83, 84.

In this case, the son, being eighteen, was old enough to render service. It follows that the father, in this case, had the right to sue in the manner in which he has sued, in the count aforesaid, the first count in the declaration; and, therefore, that the decision of the court below, sustaining the demurrer to that count, was wrong. The question as to what is the measure of damages, in such a case as that disclosed in that count, is not made, and could not be made, on this demurrer. We may be allowed, however, to refer to *Smith's Master and Servant*, 83-86, and to the citations for those pages, as containing what may be useful in investigating that question.

The second count differs from the first in this, that it alleges the said son and servant of the plaintiff to have been received by the superintendent Wadley as a hireling, to perform certain services

about the cars, &c., for which the plaintiff was to be paid. It alleges that the injury, resulting in the death of the son, was brought about by the negligence of Wadley and his servants. Now, Wadley, in hiring the minor son, acted simply as agent for the State. He was the State's superintendent of the State's road. Wadley and his servants, and this minor son, after his hiring, were, therefore, all fellow-servants of a common principal, — the State. And this suit is, in effect, against that principal. Now, the question is, does an action lie against the principal for an injury done to a servant, by a fellow-servant, at a time when both servants are acting in the course of their common employment?

3. The answer to this question seems to us to be well given in a late case in the English Exchequer of Pleas. In that case the court said: "The principle is, that a servant, when he engages to serve a master, undertakes, as between him and his master, to run all the ordinary risks of the service, and this includes the risk of negligence on the part of a fellow-servant, whenever he is acting in discharge of his duty, as servant of him who is the common master of both." *Hutchinson v. Railway Co.*<sup>1</sup> To the same effect is *Priestly v. Fowler*.<sup>2</sup> The principle, as thus laid down, is recognized by this court in *Scudder v. Woodbridge*.<sup>3</sup> It follows that, in this second count, the plaintiff sets forth no sufficient cause of action; and that, therefore, the demurrer was properly sustained. But, as the demurrer to the first count was improperly allowed, the judgment allowing that demurrer ought to be reversed, and the case ought to be reinstated.<sup>4</sup>



## GREEN v. THE HUDSON RIVER RAILROAD COMPANY.

COURT OF APPEALS, NEW YORK, JANUARY, 1866.

[Reported in 2 Keyes, 294.]

LEONARD, J. This case involves but a single proposition. It is, whether an action can be maintained by a husband for damages arising from the instantaneous killing of his wife by the negligence of the defendants.

The case comes up on demurrer to the complaint for not stating facts sufficient to constitute a cause of action.

The complaint states that the wife became a passenger on the defendants' cars; the legal obligation to carry her safely; that she was

<sup>1</sup> 5 Exch. R. 351, 352.

<sup>2</sup> 3 M. & W. 1.

<sup>3</sup> 1 Kelly, 198.

<sup>4</sup> *James v. Christy*, 18 Mo. 162, acc. — ED.











killed, while a passenger, by the carelessness of the agents of the company, whereby the plaintiff lost the comfort and assistance of his wife in his domestic affairs, which he would otherwise have had, to his damage of fifteen thousand dollars.

The rule at common law is well settled that no damages can be recovered by action for injuries resulting in immediate death. Actions for injuries to the person abate, by the common law, by death, and cannot be revived or maintained by the executor, administrator, or heir of the deceased.

The plaintiff claims a distinction, that his action is not brought for the injuries sustained by his wife, but for his own loss, by being deprived of her society and assistance: something in the nature of the injury sustained by the husband in actions for *crim. con.*

The rule is different, however. It may be remarked, also, that in the latter case, the wife being alive, there is a certainty that the husband might, but for the act of the seducer, have continued to enjoy her society. It is of no practical utility to search for the reason of the rule. It remains somewhat obscure. Whether it arose from the sentimental reason, that the destruction of life by negligence was an injury that could not be compensated in damages, as suggested by a learned judge, Baron Parker, in an English case, or from the policy of the law to secure a greater safety to life and limbs by merging or drowning the right to damages by a civil action in the felony resulting from the killing of a human being by the negligent act of another, thus insuring the co-operation of the next of kin, as may be supposed, in a vigorous prosecution of the criminal, and preventing the composition or settlement of such offences, as I am inclined to believe, it is now of little consequence to inquire. It is sufficient that the rule is settled so firmly that courts would travel beyond their province into the boundaries of legislation by any attempt to alter it, or to create, by their decision, causes of action not before known.

The parent cannot, at common law, recover for the loss of the services of his child, nor the wife or child for the loss of the care, support, and nurture of the husband or father, where his death has been brought about by the act of another, whether negligent or wilful. The loss in each of these cases is of the same character as that sustained by the plaintiff. These are injuries for which the law formerly afforded no redress in damages. Recently the legislature have intervened by enactment in this State, and in several other States of the Union, and also in Great Britain, and the common-law rule has been modified so as to give a right of action for the benefit of the wife and next of kin of the deceased by the personal representatives where the party injured might have recovered damages in respect thereof, if death had

not ensued. Session Laws, 1847, c. 450, amended in 1849, c. 256; R. S., vol. iv. pp. 526, 527 (Edmond's ed.). This modification does not extend to giving a right of action to the husband, where his deceased wife could have maintained an action in conjunction with her husband, for an injury to her, if death had not ensued. The husband must wait till legislative wisdom has modified the rule of law in his favor, too, before he can maintain such an action as the present one.

But two cases can be found in the reports of decisions in this State, giving the slightest authority for bringing this action, and those, as reported, will not be found, on a critical examination, at variance with the former current of authority, or will be found to be remarks not called for by the case then before the court. The first is the case of *Ford v. Monroe*. It appears from the facts, as reported, that the plaintiff recovered for the loss of the services of his son, a child of ten years, killed by the negligence of the defendant's servant in driving a gig. There appears to have been no question raised or considered in respect to the cause of action, except only as to the proof of the relation of master and servant existing at the time, and the allegation of special damage in the declaration, and the proof of the direct consequential relation of the damage to the act complained of. The small amount of the recovery, only \$200, might lead to the inference that the recovery was for the expenses of interment, or that some care and expense were bestowed in an attempt to recover the child. The charge of the judge, that the plaintiff would be entitled to recover for the services of the child till he became twenty-one years of age, if the act was caused by the negligence of the servant, leads to the inference that the recovery was upon a ground analogous to that urged in the case at bar. It does not appear that any exception was taken to the charge, or that it was made the ground of the application for a new trial, and the subject is not referred to in the opinion of the court in the most distant manner.

Bronson, J., who was one of the judges in the case of *Ford v. Monroe*, says, in the subsequent case of *Pack v. The Mayor, &c.*,<sup>1</sup> where the court below had charged that the plaintiff could recover for the probable pecuniary profit of his child's services, until he became of age, the child having survived the injury an hour and a half, that he has "a strong impression that the father could recover nothing on account of the injury to the child, beyond the physician's bill and funeral expenses," citing *Reeve's Dom. Rel.*, and the case of *Ford v. Monroe*, as authority for the position. Unless the memory of Judge Bronson served him for something not to be found in the report of the case of *Ford v. Monroe*, he would hardly have referred to it as authority for

<sup>1</sup> 3 N. Y. 493.









the position stated in *Pack v. The Mayor*. The other case cited by the plaintiff's counsel, from the reports of this State, is that of *Lynch v. Davis*, a decision of the special term of the Supreme Court, reported in 12 How. 323.

That action was brought by the plaintiff, as the administrator of his wife, against the defendant, for causing her death by malpractice as a physician. The defendant demurred to the complaint, and the court very properly sustained it. The action appears to have been brought under the act of 1847, which gives an action to the personal representatives of the person injured and dying, when the injured person, if living, might have maintained an action. The judge says that the action would have been the husband's had she lived, though she, being the meritorious cause, must have been joined.

The whole authority of the case is that the statute does not give an action to the personal representatives of a married woman against any person for wrongfully causing her death.

The judge also states, as a fact within his own knowledge outside of the case before him, that the plaintiff had brought an action in his own behalf, founded on the breach of the defendant's obligation under his employment as a physician, for the damages sustained by reason of the loss of the society and aid of his wife, and had recovered such damages as a jury thought fit to award him. The particulars of that other action are not stated. It is highly probable that the death of the wife was not instantaneous, and that the husband had bestowed his care and incurred expense, as well as sustained the loss of her society and aid, during the time she survived after the commission of the acts of malpractice which caused her death, so that a technical right of action existed for the recovery of damages by the husband in his own right. It would then have been in the power of the jury to have measured the damages very liberally in such a case, without violating any rule of law. The *dicta* of the judge can be explained only upon the theory suggested:—

“The judge says in that case, *obiter*, that the common law gave the husband and the father a right to recover of the wrong-doer the pecuniary injury he had sustained by reason of the killing of his wife or child. The husband had availed himself of this right of action, in this very case, to recover damages for the loss of his wife. The object of the act of 1847 was to extend the same rule to the wife and child, so that they also might recover the pecuniary damages they had sustained by the wrongful killing of the husband or father.”

The learned judge cites no authority for the rule of the common law as stated by him, and I think he would be unable to find it laid down to that extent. He is, I think, also under some error in respect to

the object of the act of 1847. The purpose of that act was to give a right of action where none existed before on account of the death of the person injured. It was to remove the disability arising from the common-law rule that personal actions died with the person.

The English act giving the same remedy as that contained in our act of 1847, enacted in the Parliament of Great Britain, August 26, 1846, a few months only prior to the adoption of the act by the legislature of this State, recites the rule of the common law thereby modified in these words, viz.: "Whereas no action at law is now maintainable against a person who, by his wrongful act, neglect, or default, may have caused the death of another person, and it is sometimes right and expedient that the wrong-doer in such case should be answerable in damages for the injury so caused by him;" thus stating the mischief and the remedy intended.

The two cases referred to are not authority for the principles invoked by the plaintiff, which are necessary to sustain his action, except in a very inferential and doubtful manner.

At all events, they cannot overthrow the rule of the common law before stated, and which may be found more fully in the following authorities: *Toller's Executors*, 436; *Whitford v. Panama Railroad Co.*; <sup>1</sup> *Oldfield v. The New York & Harlem Railroad Co.*; <sup>2</sup> *Sedgwick on Damages*, 551 (marginal).

The subject was very fully and learnedly considered by Justice Bacon, when this case was before him at special term, in an opinion afterward adopted at the general term on appeal, and now reported in 28 Barb. 9. The case required no further discussion than is so well and carefully given in 28 Barbour, and I am conscious of having added very little to the subject, although I have examined it at some length.

The judgment should be affirmed with costs.

HUNT, J. The complaint alleges that the plaintiff was the husband of Eliza Green; that, on the ninth day of January, 1856, the said Eliza was a passenger on the train of the defendants' cars, proceeding from Albany to New York; that, by the gross carelessness and unskillfulness of the agents of the defendants, a collision occurred, by means of which the said Eliza was then and there killed, "whereby the plaintiff has lost and been deprived of all the comfort, benefit, and assistance of his said wife in his domestic affairs, which he might and otherwise would have had, to his damage," &c. The defendants demurred to this complaint, as not containing facts sufficient to constitute a cause of action. The general term of the fifth district rendered a judgment for the defendants upon this demurrer.

<sup>1</sup> 23 N. Y. 476.

<sup>2</sup> 14 N. Y. 416.











The plaintiff bases his claim upon the legal idea that he was entitled to the services of his wife during her life, and that the defendants, by carelessly and illegally shortening her life, destroyed the value of such services, and that he thereby suffered a pecuniary damage. The husband is, by the common law, entitled to the services of his wife for his own pecuniary benefit. He may sue for and recover the value of her labor, as a debt due to him, in the same manner that a father is entitled to the services of his minor child, and may demand, and is entitled to receive, her wages or the value of her labor, in whatever form it may be presented. That this is the rule, unless such demand is limited to the life of the wife, and is destroyed by her death, is not denied.

The plaintiff cites in his favor *Cross v. Guthery*, decided in the Superior Court of Connecticut in 1794. The plaintiff alleged in that case that he had employed the defendant to perform a surgical operation upon his wife, the defendant being a surgeon, and declaring himself competent well and skilfully to perform the operation; that the operation was performed so ignorantly, negligently, and unskilfully, that the wife died in a few hours thereafter. He further alleged that he had thereby been put to great cost and expense, and deprived of the service, company, and counselship of his wife, and claimed damages to £100. The jury found for the plaintiff £40; and, on appeal, the court sustained the verdict, saying that the rule urged by the defendant, that the private injury was merged by the death of the wife in the public offence, was applicable only to capital crimes, where, from necessity, the offender must go unpunished or the injured individual go undressed.

The plaintiff also cites *Plummer v. Webb*,<sup>1</sup> in which the plaintiff sought to recover damages for the death of his minor son, caused by the cruel and illegal treatment of the defendant. This case was decided against the plaintiff, on the ground that at the time of the death of the son the defendant, as captain of the ship, and not the father, was entitled to his services. The learned judge discusses the principle under consideration, and argues at length in favor of the right to recover in such cases. As it was expressly decided, however, on the ground mentioned, this can hardly be considered an authority in favor of the plaintiff.

*Ford v. Monroe* was an action brought by a father to recover damages arising from the killing of his child by the negligence of the defendant's servant. The judge at the circuit charged the jury that the plaintiff was entitled to recover such sum by way of damages as they should be of opinion the services of the child would have been

<sup>1</sup> Ware, 75.

worth to him until he became twenty-one years of age. The case was carried to the Supreme Court, and a verdict of \$200 in favor of the plaintiff was sustained. This case has been much criticised in the New England authorities, and it is certainly quite remarkable that neither the counsel nor the court allude to the question now before us. The only point discussed was the authority of the servant.

Lynch v. Davis was a special term decision,<sup>1</sup> in which the plaintiff brought an action as administrator, under the law of 1847 (Sess. Laws, 1847, p. 575), to recover damages for the death of his wife. On demurrer to the complaint, the court held the demurrer well taken, and dismissed the complaint. In his general discussion of the case, the judge states that the action could be maintained by the husband in his individual character. As the case was, however, decided on another point, and the question now before us did not there necessarily come up, it cannot be considered as an authority in favor of the plaintiff.

The plaintiff's case rests therefore on the authority of *Cross v. Guthery*, with such aid as it may derive from *Ford v. Monroe*.

The plaintiff's position cannot be maintained against the array of authorities and *dicta* which the defendants have massed against it. I will refer to a portion of them only.

In *Higgins v. Butcher*, the court held that, "if one beat the servant of J. S., so that he die of the beating, the master shall not have an action against the other for the battery and loss of service; because, the servant dying of the beating, it is a felony, and this has drowned the particular offence, and prevails over the wrong done to the master, and his action by that is gone." The decision is in point, although the reason given is not now a sound one.

*Baker v. Bolton*, decided in 1808. The plaintiff's wife was thrown from the top of a stage-coach, by the negligence of the defendant, and so badly injured that she died in about a month. The action was to recover damages for being "deprived of the comfort, fellowship, and assistance of his wife." It appeared in the case that the plaintiff was a publican, and that the wife was of good use to him in his business. Lord Ellenborough held that he could only recover damages for the loss from the time of the injury till the death; that "in a civil court the death of a human being could not be complained of as an injury, and in this case, the damages as to the plaintiff's wife must stop with the period of her existence."

In *Carey v. Berkshire Railroad Co.*, the plaintiff's child was instantly killed by the carelessness of the defendant's servant, and the father brought his action to recover damages for his loss of service. The

<sup>1</sup> 12 How. Pr. 322.











court declared the common law to be decisive against the action. In relation to *Ford v. Monroe*, the court say "that no question was there raised concerning the legal right of the plaintiff to recover damages caused by the killing of his son. For aught that appears in the report, that point was assumed, and passed *sub silentio*, both at the trial and *in banc*."

In *Lucas v. The New York Central Railroad*,<sup>1</sup> the general term of the sixth district held distinctly "that the instant killing of the plaintiff's wife by the careless act of the defendant cannot give the plaintiff an action for the loss of her services. Death following instantly upon the act complained of, there was no time during her life when it could be said that the husband had lost the services of his wife in consequence of the injury complained of."

The question is discussed and the same principle laid down in *Nickerson v. Harriman*,<sup>2</sup> and in *Connecticut Mutual Life Insurance Co. v. New York & New Haven Railroad Co.*,<sup>3</sup> but the cases were in part at least decided on other points.

The principle in opposition to the plaintiff's right of recovery is laid down in *Smith's Master and Servant*, 85 (75 Law Library), citing older cases.

The same view of the question has been repeatedly announced by the different judges of this court, although the question has never been distinctly presented or formally decided until the present case. It was so stated by Davies, J., in *Whitford v. Panama Railroad Co.*,<sup>4</sup> and by Comstock, J., in the same case;<sup>5</sup> and again by the latter judge in *Quin v. Moore*.<sup>6</sup> The same rule was laid down by Wright, J., in *Oldfield v. New York & New Haven Railroad Co.*,<sup>7</sup> and by Bronson, J., in *Pack v. The Mayor of New York*.<sup>8</sup> The same rule has also been laid down by Bosworth, Hogeboom, Sutherland, Woodruff, Ingraham, and Hoffman, JJ.; but it is scarcely necessary to multiply this class of references, where the case was not decided upon the precise proposition now in question.

In many elementary authorities cited by the defendant, the principle of *actio personalis moritur cum persona* is laid down, and in 1 Williams on Executors, p. 668, the principle is broadly stated thus: "If an injury was done either to the person or property of another, for which damages only could be recovered in satisfaction, the action died with the person to whom or by whom the wrong was inflicted." That principle, in my judgment, does not touch the present class of cases.

<sup>1</sup> 21 N. Y. 245.

<sup>3</sup> 25 Conn. 265.

<sup>5</sup> 23 N. Y. 484, 485.

<sup>7</sup> 14 N. Y. 316.

<sup>2</sup> 38 Maine, 277.

<sup>4</sup> 23 N. Y. 475, 476.

<sup>6</sup> 15 N. Y. 436.

<sup>8</sup> 3 N. Y. 493.

In its legal aspect, the injury here complained of was done to the plaintiff, and not to his deceased wife. The claim is for compensation for injury to his rights, and not to hers. Should her executors bring their action to recover damages for the pain and anguish suffered by her from the cause alleged, the principle of *actio personalis* would find its proper application. It is not applicable to the action of the present plaintiff, in which the party alleged to be injured, and the party inflicting the injury, are still in existence. It is the subject-matter of the injury, merely, which has ceased to exist.

If the rule of the common law is harsh or narrow, it is for the legislature to alleviate the evil, and enlarge the remedy. This has been done in some degree in this State, and in Great Britain much more extensively by the act 9 & 10 Vict. c. 93. However strong may be our sympathy with the plaintiff, we are compelled to content ourselves with expounding the law as we find it. The right to correct or improve it belongs to another department of the government.

*Judgment affirmed.*<sup>1</sup>

<sup>1</sup> *Worley v. C. H. & D. R. R.*, 1 Handy (Ohio), 481, acc. — ED.

In the following cases the judges extra-judicially indicate opinions expressly or impliedly in accordance with the decision here given: *Conn. Mut. Ins. Co. v. N. Y. & N. H. R. R. Co.*, 25 Conn. 271; *Hubgh v. N. O. & C. R. R. Co.*, 6 La. An. 496; *Kearney v. B. & W. R. R. Co.*, 9 Cush. 109; *Hollenbeck v. Berkshire R. R. Co.*, 9 Cush. 480; *Palfrey v. P. S. & P. R. R. Co.*, 4 All. 56; *Wyatt v. Williams*, 43 N. H. 105; *Pack v. The Mayor*, 3 N. Y. 489; *Quin v. Moore*, 15 N. Y. 436; *Whitford v. Panama R. R. Co.*, 23 N. Y. 475; *Campbell v. Rogers*, 2 Handy (Ohio), 110.

In the following cases the judges extra-judicially indicate opinions expressly or impliedly at variance with the decision here given: *Plummer v. Webb, Ware*, 78; *Mercer v. Jackson*, 54 Ill. 397; *Lynch v. Davis*, 12 How. Pr. 324; *Whitford v. Panama R. R. Co.*, 23 N. Y. 489-491. In the latter case, Comstock, C. J., reversed his *dictum* given in *Quin v. Moore*, 15 N. Y. 435, and added: "On principle, I should say that the action of the parent for the consequential loss of the child's service is not affected by the death of his child or servant." — ED.











## CHAPTER VIII.

## CONVERSION.

## MULGRAVE v. OGDEN.

IN THE QUEEN'S BENCH, HILARY TERM, 1591.

[Reported in *Croke's Elizabeth*, 219.]

ACTION SUR TROVER of twenty barrels of butter ; and counts that he *tam negligenter custodivit* that they became of little value. Upon this it was demurred, and held by all the justices, that no action upon the case lieth in this case ; for no law compelleth him that finds a thing to keep it safely ; as if a man finds a garment, and suffers it to be moth-eaten ; or if one find a horse and giveth it no sustenance ; but if a man find a thing and useth it, he is answerable, for it is conversion ; so if he of purpose misuseth it, as if one finds paper and puts it into the water, &c. ; but for negligent keeping no law punisheth him. *Et adjournatur*.<sup>1</sup>

## EASON v. NEWMAN.

IN THE QUEEN'S BENCH, HILARY TERM, 1595.

[Reported in *Croke's Elizabeth*, 495.]

ACTION on the case upon trover. A special verdict was found that one Pepper was possessed of those goods, and the defendant found them, and Pepper made the plaintiff his executor ; and that the defendant, knowing them to appertain to the plaintiff, denied to deliver them to him upon his request ; and whether that were a conversion without any other act done, was the question. And all the justices, POPHAM *absente*, held that it was a conversion by the sole denial. But, being afterwards moved again, POPHAM held it to be no conversion ; but it

<sup>1</sup> Bromley v. Coxwell, 2 B. & P. 438 ; Conner v. Allen, 33 Ala. 515 ; Railroad Co. v. Kidd, 7 Dana, 252 ; Ragsdale v. Williams, 8 Ired. 498 ; Emory v. Jenkinson, Tapp. 219 ; Ankim v. Woodward, 6 Whart. 577 ; Jones v. Allen, 1 Head, 626 ; Abbott v. Kimball, 19 Vt. 558 ; Nutt v. Wheeler, 30 Vt. 436 ; Tinker v. Morrill, 39 Vt. 477, acc. — Ed.

was cited at the bar that, 23 Eliz. in this court, it was ruled to the contrary. *Et adjournatur*.<sup>1</sup>

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DRAPER v. FULKES.

IN THE KING'S BENCH, MICHAELMAS TERM, 1609.

[Reported in *Yelverton*, 165.]

A MAN brought an action on the case on trover against husband and wife, and declared that he was possessed of several goods in specie, till such a day he lost them, which came to the possession of both the defendants, and they converted them, to his damage, &c.; and on *non cul.* pleaded, it was found for the plaintiff, and judgment given in the Common Pleas, and affirmed in the King's Bench on a writ of error. Yet an exception was taken to the declaration, because the conversion is laid to the charge of the wife as well as to the charge of the husband, and a *feme covert* cannot convert goods, but it shall be said the conversion of the husband only, for in regard she can have no property, but the whole is in the husband, therefore the conversion shall be said the act of the husband only. To which YELVERTON answered, that this action is not grounded on any property supposed to be in the defendants, but on the possession only, and the point of the action is the conversion, which is a tort with which a *feme covert* may be well charged, as well as she may be charged with a trespass or disseisin committed. And if a *feme covert* takes my sheep and eats them, or other goods and converts them, I may well have this action against husband and wife, and suppose the conversion in the wife only; viz., the tort. But husband and wife cannot have an action on trover, and suppose the possession in them both, for the law will transfer in point of ownership the whole interest to the husband, as 21 Edw. IV. 4, is.

*Quod fuit concessum per totam curiam*.<sup>2</sup>

<sup>1</sup> Case of the Chancellor of Oxford, 10 Rep. 56 b; Isaac v. Clark, 2 Bulst. 308; Morris v. Pugh, 3 Burr. 1243; Cutter v. Fanning, 2 Iowa, 580; Hill v. Covell, 1 N. Y. 522, *contra*. — ED.

<sup>2</sup> Marshe's Case, 1 Leon. 312; Baldwin v. Mortin, Ow. 48; Coxe v. Cropwell, Cro. Jac. 5; Hodges v. Sampson, W. Jones, 443; Newman v. Cheyney, Latch, 126; Keyworth v. Hill, 3 B. & Ald. 685; Catterall v. Kenyon, 3 Q. B. 310; Heckle v. Lurvey, 101 Mass. 344, acc.; Berry v. Nevys, Cro. Jac. 661; Rhemes v. Humphreys, Cro. Car. 254; Perry v. Diggs, Cro. Car. 494; Bullen's Case, W. Jones, 264; Gallop v. Symson, Style, 115; Note 1 Brownl. 3; Reames v. Humphries, 1 Roll. Abr. 348, *contra*. See also Clark v. Pew, Style, 18; Rowell v. Keefe, 6 Rich. 521. — ED.









AGARS *v.* LISLE.

IN THE COMMON PLEAS, MICHAELMAS TERM, 1613.

[Reported in *Hutton*, 10.]

THOMAS AGAR brought an action upon the case against Lisle, for finding and converting of a cow at the castle of York. The defendant pleaded in bar that the Bishop of Durham was seised of the town of Darton, in the county of Durham, and prescribe to have a fair there and toll, and for not payment thereof, &c., the cow was taken by the defendant, as servant to the Bishop of Durham, *absque hoc*, that he was guilty at the castle of York, or anywhere else, &c. And this case was long depending, and the first point was, if the defendant had confessed any conversion, for that is the ground of the action, and ought to be traversed, or else confessed and avoided. It was agreed that the conversion is the ground of the action. Brook 1 Mar. Trespass, 121, and the inducement ought to be such as contain sufficient matter with the trespass. *Vide* 9 Edw. IV. 5; 19 Hen. VI. 30; 22 Hen. VI. 35, 8. Then it was agreed, that when one takes a distress, and such an action is brought, that is no plea, for that is not any conversion. *Vide* 27 Hen. VIII. 22; Coke, lib. x. fol. 46, 47. Request and refusal to deliver is good evidence to prove conversion; but if it be found specially it shall not be adjudged conversion; and judgment was given for the plaintiff, because the defendant did not claim any property, and did not answer to the point of the action, for a distress is no conversion.<sup>1</sup>

## HOLSWORTH'S CASE.

AT THE YORK ASSIZES, CORAM BARKLEY, J., JULY, 1638.

[Reported in *Clayton*, 57.]

AN action of trover and conversion was brought for oats, &c.; and the case upon proof was, that certain trespassers had taken these oats from the plaintiff and brought them to the mill to make into oatmeal,

<sup>1</sup> *Ascue v. Sanderson*, Cro. Eliz. 433; *Dee v. Bacon*, Cro. Eliz. 435; *Johnes v. Williams*, Cro. Jac. 165; *Salter v. Butler*, Noy, 46; *Hartfort v. Jones*, Raym. 393; *Wingfield v. Stratford*, Sayer, 15; *Wilkinson v. Whalley*, 5 M. & Gr. 590; *Whitmore v. Greene*, 13 M. & W. 104; *Kynaston v. Crouch*, 14 M. & W. 266; *Higgins v. Thomas*, 8 Q. B. 908; *Ringham v. Clements*, 12 Q. B. 260; *Young v. Cooper*, 6 Ex. 259, acc.; *Stancliff v. Hardwicke*, 2 C., M. & R. 1; *Vernon v. Shipton*, 2 M. & W. 9; *Weeding v. Aldrich*, 9 A. & E. 861, *contra* may be considered to be overruled. — ED.

as the use is, and the plaintiff came to the miller before any thing done, and demanded the oats as his, and forbade him to proceed to make them into shilling or oatmeal; but the miller did proceed for all that, and made it into oatmeal: and the judge directed this to be a conversion in the miller, and directed the jury accordingly, although it was urged by the counsel of the defendant that a miller was a public officer, and he did but his duty in this case. And in this case it was holden further, that if A. take goods from me, and these afterwards come to the hands of B., by buying or otherwise, and he converteth them to his use, B. shall not be charged to me without a new demand made of them unto him, and a detention afterward; and where such goods are delivered at first by the owner and after detained upon demanding them, detinue lieth and not trover in that case. See Edw. IV. 23; 21 Edw. IV. 74; 16 Hen. VII. 23.

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GEORGE v. WIBURN.

IN THE KING'S BENCH, MICHAELMAS TERM, 1638.

[Reported in 1 Rolle's Abridgment, 6, placitum 4.]

IF I bail goods to a common carrier to carry to a place, and then the goods are taken from the carrier, this is no conversion in the carrier to charge him in a trover and conversion. But an action on the case lies against him as carrier on the custom of the realm to carry goods safely and to deliver them as is appointed. In arrest of judgment.<sup>1</sup>

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BECKWITH v. ELSEY.

AT THE YORK ASSIZES, CORAM TURNER, SERJEANT JUDGE,  
MARCH 24, 1641.

[Reported in Clayton, 112.]

IN an action of trover and conversion, and nothing proved but a tortious taking of the cattle by way of trespass, and driving them away, and it was ruled a good ground for this present action, and a conversion shall be intended, otherwise when he comes to them by trover, there an actual conversion shall be proved.<sup>2</sup>

<sup>1</sup> Lowndes's Case, Clayt. 104; Owen v. Lewyn, 1 Vent. 223, acc. — ED.

<sup>2</sup> See Metcalfe's Case, Clayt. 113; Bruen v. Roe, 1 Sid. 264; Norman v. Bell, 2 B. & Ad. 190; Tear v. Freebody, 4 C. B. N. S. 228; Moody v. Whitney, 34 Me. 563;











## ROOKEBY, HIS CASE.

AT THE YORK ASSIZES, CORAM GERMINE, J., MARCH, 1647.

[*Reported in Clayton, 122.*]

IN action of trover, &c. And to prove the conversion it was offered that the plaintiff did demand satisfaction for the corn, and it was ruled good evidence, the demand being to the party himself who took this corn, though the corn itself was not demanded, but satisfaction, *quod nota*.<sup>1</sup>

## MIRES v. SOLEBAY.

IN THE COMMON PLEAS, TRINITY TERM, 1677.

[*Reported in 2 Modern Reports, 242.*]

TROVER and conversion. On a special verdict the case was this, viz., H., being possessed of several sheep, sells them in a market to Alston, but did not deliver them to the vendee. Afterwards, in that very market, they discharge each other of this contract, and a new agreement was made between them, which was, that Alston should drive the sheep home and depasture them till such a time, and that during that time H. would pay him so much every week for their pasture; and if at the end of that time (then agreed between them) Alston would pay H. so much for his sheep (being a price then also agreed on), that then Alston should have them. Before the time was expired, H. sells the sheep to the plaintiff, Mires, and afterwards Alston sells them to one Marwood, who brought a replevin against the plaintiff for taking of the sheep; and the officers, together with Solebay, the defendant (who was servant to Marwood), did by his order, and in assistance of the officers, drive the sheep to Marwood's grounds, where they left them. The plaintiff demands the sheep of Solebay, and, upon his refusal to deliver them, brings this action against the servant.

The question was, whether it would lie or not.

It was urged at the bar that the action would not lie against the

Nelson v. Burt, 15 Mass. 204; Cummings v. Perham, 1 Metc. 555; Phillips v. Bowers, 7 Gray, 21; Coughlin v. Ball, 4 All. 334; Johnson v. G. T. R. R. Co., 44 N. H. 626; Davis v. Flemming, 1 McCord, 213; Childress v. Ford, 1 Heisk. 463; Weymouth v. R. R. Co., 17 Wis. 550. — ED.

<sup>1</sup> Thompson v. Shirley, 1 Esp. 31; Le Place v. Aupoix, 1 Johns. Cas. 406, acc. — ED.

defendant, because he had not the possession of the goods at the time of the action brought; for he presently put them into his master's ground; and it was said, if A. find goods, and S. takes them away before the action brought, trover will not lie against A.; but it is otherwise if he sell them.<sup>1</sup> In this case it would have been a breach of trust in the servant to have delivered the goods belonging to his master to another. It is true, if there be a conversion, though the possession be removed before the action brought, yet the action will lie, but that is because of the conversion. Many cases were put where the servant is not liable to an action for a thing done by the command of his master; and where a bailiff, who is but a servant to the sheriff, shall not be charged in a false return made by his master. Cro. Eliz. 181. So if a smith's man prick a horse, the action lies against the master, and not against the servant.

The court, before they delivered any judgment in this case, premised these two things:—

First, That it is necessary in trover to prove a property in the plaintiff, and a trover and conversion in the defendant; and it was said by Atkins, J., but denied by the Chief Justice, that though goods are sold in a market, yet the property is not changed till the delivery, for which he cited Keilway, 59, 77. But the court held clearly in this case that the first sale to Alston was defeated by the agreement of the parties afterwards; for when a bargain is made, and all the parties consent to dissolve it, and other conditions are proposed, the new agreement destroys the former bargain. And the Chief Justice said, that if a horse was bought in a market, for which the vendee is to pay ten pounds, if the ready money be not paid, the property is not altered, but the party may sell him to another.

Secondly, This new agreement, to have the sheep if Alston would pay such a sum of money at a future day, will not amount to a sale, and the new property is changed, and consequently the sale by H. to the plaintiff before the day is good, and so the property of the sheep is in him.

But the whole court were of opinion that the action would not lie against the defendant.

First, The defendant could be guilty of no conversion, unless the driving of the cattle by virtue of the replevin would make him guilty; but at that time the sheep were *in custodia legis*, and the law did then preserve them so that no property can be changed; and if so, then there could be no conversion.

Secondly, The action will not lie against the servant; for it being

<sup>1</sup> 1 Roll. Abr. 6. See also 1 Com. Dig. 221, F.











in obedience to his master's command, though he had no title, yet he shall be excused. And this rule Justice Scroggs said would extend to all cases where the master's command was not to do an apparent wrong; for if the master's case depended upon a title, be it true or not, it is enough to excuse the servant; for otherwise it would be a mischievous thing, if the servant upon all occasions must be satisfied with his master's title and right before he obey his commands; and it is very requisite that he should be satisfied, if an action should lie against him for what he doth in obedience to his master. But it was said, the<sup>1</sup> servant cannot plead the command of his master in bar of a trespass. And it was likewise said, that in this case, the driving of the cattle by the servant to the grounds of his master, or a stranger's helping to drive them without being requested, is justifiable.

Thirdly, Because what was done by the defendant was done in execution of the process of the law, and he might as well justify as the officer; for if he forbid the defendant to have assisted him, yet his assisting him afterwards would not have made him guilty, because done in execution of the law.

Fourthly, Because it is not found that the servant did convert the sheep to his own use; for the special verdict only finds the demand and the refusal, which is no conversion; and though it is an evidence of it to a jury, yet it is not matter upon which the court can give judgment of a conversion: 10 Co. 57; and therefore the jury should have found the conversion as well as the demand and refusal, like the case in 2 Roll. Abr. 693. In an assise of rent-seck, upon *nul tort* pleaded, the jury found a demand and refusal, *et sic disseisivit*; it was held to be no good verdict, for the demand ought to have been found on the land, and shall not be so intended unless found. The plaintiff here hath set forth in his declaration a request to deliver; then a refusal and conversion, too, which shows that they ought to be found, because distinct things; and the finding of the demand and refusal was only a presumptive, not a conclusive proof of the conversion; and if the jury themselves know that there was no conversion, yet the plaintiff hath failed in his action; as if a trover be brought for cutting trees and carrying of them away, and the jury know that though the defendant cut them down, yet they still lay in the plaintiff's close, this is no conversion. And though it has been strongly insisted at the bar that the court shall intend a conversion, unless the contrary appeared, and are to direct a jury to find the demand and refusal to be a conversion, and the opinion of Doddridge and Croke, in 1 Roll. Rep. 60, was much relied on, where Adams recovered against

<sup>1</sup> Wyne and Rider, 2 Mod. 67; 4 Bac. Abr. 258.

Lewis forty pounds in the court of Exon, and three butts of sack were taken in execution, and the plaintiff deposited twenty-two pounds in the hands of the defendant to prevent the sale of the sack, which was to be a pledge to return it upon request, if the defendant was not paid before the next court day; the jury found the debt was not paid, and that no request was made to return the sack, but that the plaintiff requested the defendant to return the money; yet it was held by those two justices, that the law would supply the proof of a conversion though it was not found, for it shall be presumed that the money was denied to the plaintiff, and that the defendant might use it himself; and because no other proof could be made, that very denial shall be a conversion in law. So a denial of a rent-seek after demand is a disseisin, much more in personal actions where the substance is found, it is well enough. 1 Inst. 282 *a*.

But the court said that, notwithstanding this authority, they would not intend a conversion, unless the jury had found it, especially in this case, because they ought to have found it to make the servant liable; for if the conversion was to the use of his master, there is no color for this action to be brought against the defendant, but it ought to be brought against the master.

Whereupon a *venire facias de novo* was prayed to help the insufficiency of the verdict, the conversion not being found. But the court said it was to no purpose to grant a new trial, unless the plaintiff had a new case.

*And so judgment was given for the defendant.*<sup>1</sup>

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## LORD PETRE v. HENEAGE.

AT NISI PRIUS, CORAM LORD HOLT, C. J., EASTER TERM, 1699.

[Reported in 12 Modern Reports, 519.]

TROVER<sup>2</sup> by the plaintiff, as administrator *cum testamento annexo* of the late Lord Petre, against the wife of the first executor, for a necklace of pearl, said to have been in the family for many generations, and worn as a personal ornament by Lady Petre for the time being, or for default of such by the lady dowager, *pro tempore*.

And here, by HOLT, C. J., the wearing of a pearl is a conversion.<sup>3</sup>

<sup>1</sup> See *Lee v. Bayes*, 18 C. B. 606, per Williams, J.; *Berry v. Vantries*, 12 Serg. & R. 92, per Gibson, J.; *Mount v. Derick*, 5 Hill, 455. — Ed.

<sup>2</sup> Only so much of the case is given as relates to the question of conversion.

<sup>3</sup> See *Poulton v. Wilson*, 1 F. & F. 403; *Gray v. Crocheron*, 8 Port. 191; *Gentry v. Madden*, 3 Ark. 127; *Clark v. Whitaker*, 19 Conn. 319; *Adams v. Mizell*, 11 Ga. 106; *Barton v. White*, 1 Har. & J. 579; *Dickey v. Franklin Bank*, 32 Me. 572;











## ANONYMOUS.

AT NISI PRIUS, CORAM LORD HOLT, C. J., 1699.

*[Reported in 12 Modern Reports, 344.]*

THE case was: A captain contracted with seamen to go on a voyage; and after he had got them on board he would not pay them, according to agreement; upon which they demanded their goods, which he refused, if they did not stay till he had searched for them, which he refused to do then; and this was held good evidence of a conversion.

HOLT, C. J. In trover, the plaintiff ought to prove property of goods in him, and at least a demand and refusal; and if there be several parcels, the orderly way to give evidence is to make an inventory of them, and prove the property of goods mentioned in it, and demand and refusal of them.

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BALDWIN v. COLE.

AT NISI PRIUS, CORAM LORD HOLT, C. J., 1704.

*[Reported in 6 Modern Reports, 212.]*

TROVER. The case, upon evidence, was this: —

A carpenter sent his servant to work for hire to the queen's yard; and having been there some time, when he would go no more, the surveyor of the work would not let him have his tools, pretending a usage to detain tools to enforce workmen to continue until the queen's work was done. A demand and refusal was proved at one time, and a tender and refusal after.

HOLT, C. J. The very denial of goods to him that has a right to demand them is an actual conversion, and not only evidence of it, as has been holden; for what is a conversion but an assuming upon one's self the property and right of disposing another's goods, and he that takes upon himself to detain another man's goods from him without cause takes upon himself the right of disposing of them; so the taking and carrying away another man's goods is a conversion; so if one come into my close, and take my horse and ride him, there it is conversion; and here if the plaintiff had received them upon the tender, notwithstanding

Lathrop v. Blake, 23 N. H. 46; Chesh. R. R. Co. v. Foster, 51 N. H. 490; Spencer v. Blackman, 9 Wend. 167; Nauman v. Caldwell, 2 Sweeny, 212; Collins v. Bennett, 46 N. Y. 490; Scruggs v. Davis, 5 Sneed (Tenn.), 261; Arnold v. Kelly, 4 W. Va. 642. Conf. Chandler v. Partin, 2 Mill, C. R. 72; Quay v. M'Ninch, 2 Mill, C. R. 78. — ED.

the action would have lain upon the former conversion, and the having of the goods after would go only in mitigation of the damages; and he made no account of the pretended usage, but compared it to the doctrine among the army, that if a man came into the service and brought his own horse, that the property thereof was immediately altered and vested in the queen; which he had already condemned.

And here one of the particulars in the declaration being ill laid, the defendant was found not guilty as to that, and guilty as to the rest.

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### ANONYMOUS.

AT NISI PRIUS, CORAM TREVOR, C. J., 1705.

[Reported in 2 *Salkeld*, 655.]

TROVER lies not against a carrier for negligence, as for losing a box; but it does for an actual wrong, as if he break it to take out goods, or sell it. *Per Cur.* Pasch. 7 W. 3, B. R. And therefore denial is no evidence of a conversion, if the thing appears to have been really lost by negligence; but if that does not appear, or if the carrier had it in custody when he denied to deliver it, it is good evidence of a conversion. *Per TREVOR, C. J.*

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### CROSSIER v. OGLEBY.

IN THE KING'S BENCH, TRINITY TERM, 1716.

[Reported in 1 *Strange*, 60.]

TROVER by an administrator for rum taken and converted in the intestate's life. Upon evidence it appeared that the rum was taken in the intestate's life, but not used till after his death. And the question was, whether this evidence of not using it till the administrator's time would not overthrow the declaration of a conversion in the intestate's life.

*Sed per Curiam*: The time of using the rum lay in the breast of the defendant, who ought to have disclosed that matter by his plea; and the taking in the life of the intestate, and keeping it till his death, is a trover and conversion sufficient to maintain this declaration. Wherefore the plaintiff had judgment, this being a point reserved at *Nisi Prius*.









## BUSHEL v. MILLER.

AT NISI PRIUS, CORAM PRATT, C. J., NOVEMBER 21, 1718.

[*Reported in 1 Strange, 128.*]

UPON the Custom-house Quay there is a hut where particular porters put in small parcels of goods if the ship is not ready to receive them when they are brought upon the quay. The porters, who have a right in this hut, have each particular boxes or cupboards, and, as such, the defendant had one. The plaintiff, being one of the porters, put in goods belonging to A., and lays them so that the defendant could not get to his chest without removing them. He accordingly does remove them about a yard from the place where they lay, towards the door, and without returning them into their place goes away, and the goods are lost. The plaintiff satisfies A. of the value of the goods, and brings trover against the defendant. And upon the trial two points were ruled by the Chief Justice:—

1. That the plaintiff having made satisfaction to A. for the goods, had thereby acquired a sufficient property in them to maintain trover.

2. That there was no conversion in the defendant. The plaintiff by laying his goods where they obstructed the defendant from going to his chest was, in that respect, a wrong-doer. The defendant had a right to remove the goods, so that thus far he was in no fault. Then, as to the not returning the goods to the place where he found them; if this were an action of trespass, perhaps it might be a doubt; but he was clear it could not amount to a conversion.



## RICHARDSON v. ATKINSON.

AT NISI PRIUS, CORAM EYRE ET FORTESCUE, 1723.

[*Reported in 1 Strange, 576.*]

THEY held that the drawing out part of the vessel, and filling it up with water, was a conversion of all the liquor, and the jury gave damages as to the whole.<sup>1</sup>

<sup>1</sup> Dench v. Walker, 14 Mass. 500, acc. — ED.

## PARKER AND ANOTHER v. GODIN.

IN THE KING'S BENCH, MICHAELMAS TERM, 1728.

*[Reported in 2 Strange, 813.]*

SATUR, a bankrupt, at the time of his going off left some plate with his wife, who, in order to raise money upon it, delivered it to her servant, who went along with the defendant to the door of Mr. Woodward the banker, and there the defendant took the plate into his hands and went into the shop and pawned it in his own name, gave his own note to repay the money, and immediately upon receipt of it went back to the bankrupt's wife and delivered the money to her. And in trover for the plate the jury (considering the defendant acted only as a friend, and that it would be hard to punish him) found a verdict for the defendant. But upon application to the court a new trial was granted, upon the foot of its being an actual conversion in the defendant, notwithstanding he did not apply the money to his own use. And upon a second trial the plaintiff obtained a verdict for the value of the plate.

## PERKINS v. SMITH.

IN THE KING'S BENCH, TRINITY TERM, 1752.

*[Reported in 1 Wilson, 328.]*

IN trover, the jury find a special verdict, which, in substance, is shortly this: that upon the 22d of September, 1749, Hughes was possessed of the goods in the declaration as his own property, and became a bankrupt that day; that the plaintiff is assignee under the commission; that upon the 23d of September, 1749, the defendant Smith, who is servant and riding-clerk to Mr. Garraway, to whom the bankrupt was considerably indebted, went to the bankrupt's shop (to try to get his master's money), and found it shut up; and that the bankrupt delivered to Smith the goods in the declaration, who gave a receipt for the same in the name of his master, and sold the same for his master's use.

It was objected that the action was improperly brought against the servant Smith, who acted wholly in this matter for his master, and that the conversion is found to be to the use of his master, which is the gist of an action of trover. After two arguments at the bar, the court gave judgment for the plaintiff.

LEE, C. J. The point is, whether the defendant is not a tortfeasor;











for if he is so, no authority that he can derive from his master can excuse him from being liable in this action.

Hughes, the bankrupt, had no right to deliver these goods to Smith; the gist of trover is the detainer or disposal of goods (which are the property of another) wrongfully; and it is found that the defendant himself disposed of them to his master's use, which his master could give him no authority to do; and this is a conversion in Smith, this disposal being his own tortious act; the act of selling the goods is the conversion, and whether to the use of himself or another it makes no difference. I am very well satisfied that this servant has done wrong, and that no authority that could be derived from his master before or after the fact can excuse him.

The finding that the defendant disposed of the goods for his master's use is only the conclusion of the jury, and does not bind the court, the taking upon him to dispose of another's property is the tortious act, and the gist of this action.

*Judgment for the plaintiff per totam curiam.*

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### TINKLER v. POOLE.

IN THE KING'S BENCH, NOVEMBER 11, 1770.

[Reported in 5 Burrow, 2657.]

THIS was an action of trover for goods seized by a custom-house officer. It was a parcel of herrings seized by him for not having satisfied the salt duty, and carried by him to the king's warehouse. It was agreed that they were not seizable; and the only question was, "whether this species of action lay against the officer for seizing them and carrying them away."

*Glynn*, Serjt., for the plaintiff, argued that it did. The conversion, he said, was the substantial part of the action; the trover is fictitious. The defendant had no authority to take them; he took them wrongfully; he was a wrong-doer; he acquired a tortious property of them in himself.

Trover lies in similar causes. It lies against a sheriff, for the unlawful conversion of the goods of a bankrupt. *Cooper v. Chitty*<sup>1</sup> and *Blackiston*, sheriffs of London. A tortious taking is, in itself, a conversion.

There is indeed a single *nisi prius* case reported in Bunbury, 67, Mich. 1720, at Guildhall sittings after that term, before Ld. Ch. Baron

<sup>1</sup> 1 Burrow, 20-37.

Bury: *Etrick v. An Officer of the Revenue*. Upon an information of seizure of goods, there had been a verdict for the defendant, who afterwards brought trover against the officer for the goods. The Attorney-General objected that trover did not lie for these goods (for that the seizure of them, and putting them into the custom-house warehouse, could not be said to be any conversion to his own use), but trespass, or trespass upon the case; and Mr. Attorney insisting upon a special verdict, and the Chief Baron inclining to be of that opinion, "that trover would not lie," the plaintiff chose to be nonsuited. But this is no solemn determination.

LORD MANSFIELD said, Mr. Bunbury never meant that those cases should have been published; they are very loose notes.

Mr. Justice WILLES mentioned another case in Bunbury, p. 80, Trin. 1721 (*Israel v. Etheridge et al.*), where Baron Price said that it was now allowed and taken for law "that trover did not lie against an officer for seizing *absque probabili causa*, but trespass would." Baron Montague was of opinion "that neither trover nor trespass would lie, because the seizure is not *contra pacem*; but that trespass upon the case, setting forth that the seizure was *absque probabili causa* would lie." Baron Page was of opinion "that trespass, or case for the consequential damages, will lie."

Mr. Dunning, for the defendants, remarked upon the case last cited, that it appeared by it that the three barons, Price, Montague, and Page, all concurred in the opinion "that trover would not lie."

LORD MANSFIELD. It is a very loose note. It makes Baron Montague say "that trespass would not lie."

Mr. Justice WILLES mentioned the case of *Kenicot v. Bogan*,<sup>1</sup> which was trover and conversion of two tuns of wine, taken for priage.

LORD MANSFIELD, who tried the present cause, said he saved this point upon the cases cited out of Bunbury by the counsel for the defendants; but nothing is clearer than "that trover lies." It is a wrongful conversion, let the property be in whom it will.

The case of *Chapman v. Lamb*<sup>2</sup> was mentioned by Mr. Wallace; which was subsequent to the others, being in Michaelmas term, 6 Geo. II. It was trover against a custom-house officer for fourteen shirts, a night gown and cap, seized for non-payment of duty, which were stated negatively "not to be imported as merchandise." The plaintiff had judgment, without any objection to its being an action of trover.

The court ordered the *postea* be delivered to the plaintiff.<sup>3</sup>

<sup>1</sup> Yelverton, 198.

<sup>2</sup> 2 Strange, 943.

<sup>3</sup> *Bishop v. Montague*, Cro. Eliz. 824; *Gomersall v. Medgate*, Yelv. 194; *Smith*











## ROSS v. JOHNSON.

IN THE KING'S BENCH, FEBRUARY 4, 1772. .

[Reported in 5 Burrow, 2825.]

AN action of trover was brought by Hugh Ross, Esq., against John Johnson and William Dowson, for certain goods mentioned in the declaration. Not guilty was pleaded, and issue joined. The cause came on to be tried at Guildhall, before Lord Mansfield, at the sittings after Michaelmas term, 1771, when the plaintiff was nonsuited, subject to the opinion of the court on the following case:—

The goods in question, being the property of the plaintiff, were delivered by the captain of a vessel to the defendants as wharfingers, for the use and upon the account of the plaintiff, to whom they were directed, but were stolen or lost out of their possession; and afterwards, before the commencement of this action, were demanded by the plaintiff of the defendants, to whom he tendered the wharfage for the same; but the goods were not delivered to him.

The question for the opinion of the court was, “whether this action will lie.”

If the court shall be of opinion “that this action will lie,” then the nonsuit to be set aside, and a verdict entered for the plaintiff, for £92 damages and 40s. costs.

*Mr. Mansfield*, for the plaintiff, argued that trover would lie.

In trover nothing more is necessary to be proved than the property being in the plaintiff, and that the defendant has converted them. It is not necessary to prove actual conversion.

A demand and non-delivery are evidence of a conversion, and are sufficient, unless the defendant can give some legal excuse for the non-delivery. The goods being stolen or lost is no excuse to a wharfinger, who takes them for hire. *Isaack v. Clerk*.<sup>1</sup> A pawnee is bound to deliver the goods pawned.

*Mr. Walker*, contra, for the defendants, argued that this action of trover could not be maintained. Trover cannot be maintained unless

*v. Plomer*, 15 East, 607; *Goode v. Langley*, 7 B. & C. 26; *Glasspoole v. Young*, 9 B. & C. 696; *Meade v. Smith*, 16 Conn. 346; *Hardy v. Keeler*, 56 Ill. 152; *Hall v. Amos*, 5 Monr. 89; *Prescott v. Wright*, 6 Mass. 20; *Woodbury v. Long*, 8 Pick. 543; *Blanchard v. Coolidge*, 22 Pick. 151; *Bowen v. Sanborn*, 1 All. 389; *McPartland v. Read*, 11 All. 231; *Woods v. Keyes*, 14 All. 236; *Dow v. Cheney*, 103 Mass. 181; *Matherny v. Johnson*, 9 Mo. 232; *Howard v. Cooper*, 45 N. H. 339; *Farrington v. Payne*, 15 Johns. 431; *Woodward v. Murray*, 18 Johns. 400; *Case v. Hart*, 11 Ohio, 364; *Taxier v. Sweet*, 2 Dall. 81; *Dargan v. Richardson*, Dudley, 62, acc. Conf. *Slack v. Littlefield*, Harper, 298; *Pettigru v. Sanders*, 2 Bail. 549. — ED.

<sup>1</sup> Moore, 841.

the defendant uses the plaintiff's property as his own. Goods may be withheld by a person who has a lien upon them; and he instanced in pawns, distresses, and carriers detaining till paid for the carriage. Bare withholding is not making use of them as his own, and without that trover will not lie. He was not obliged, he said, to maintain "that no other action would lie;" it was enough for his purpose "that the present action will not lie." A demand and refusal is only evidence of a conversion. And trover will not lie for mere negligence, for losing the goods without any actual wrong. And so is 2 Salk. 655, on trover against a carrier for losing a box.

*Mr. Mansfield* agreed that where a lawful reason is shown for not delivering the goods, the defendant is not to be considered as guilty of a conversion. But here is no lawful reason shown why they are not delivered; and therefore the mere non-delivery does amount to a conversion. If they are, in fact, lost or stolen, what is that to the owner? It does not alter the obligation which the defendants are under to deliver them to the owner; nor can the owner know what is become of them.

LORD MANSFIELD declared his disapprobation of nonsuits founded upon objections which had no relation to the merits of a cause. But he looked upon it as established upon principles and authorities, that trover would not lie in the present case; but that it must be an action upon the case.

It is impossible, he said, to make a distinction between a wharfinger and a common carrier. They both receive the goods upon a contract. Every case against a carrier is like the same case against a wharfinger; but in order to maintain trover there must be an injurious conversion. This is not to be esteemed a refusal to deliver the goods. They cannot deliver them; it is not in their power to do it. It is a bare omission.

Mr Justice ASTON agreed, that this being a bare omission, and no evidence of a conversion, trover would not lie; but the clear remedy was by action upon the case; and he cited *Owen v. Lewyn*,<sup>1</sup> where Hale said, "that if a carrier loseth goods committed to him, a general action of trover doth not lie against him.

Mr. Justice WILLES and Mr. Justice ASHHURST concurring in opinion with his Lordship and Mr. Justice ASTON,

*The court ordered that the nonsuit should stand.*<sup>2</sup>

<sup>1</sup> 1 Ventris, 223.

<sup>2</sup> *Dearbourn v. Un. Nat. Bank*, 58 Me. 273; *Dwight v. Brewster*, 1 Pick. 50; *Bowlin v. Nye*, 10 Cush. 416; *Dorman v. Kane*, 5 All. 38; *Smith v. Nat. Bank*, 99 Mass. 605; *Johnson v. Strader*, 3 Mo. 359; *Packard v. Getman*, 4 Wend. 613; *Hawkins v. Hoffman*, 6 Hill, 586; *Nat. Bank v. Wheeler*, 48 N. Y. 492, acc. *Conf. La Place v. Aupoix*, 1 Johns. Ca. 406. — ED.











SYEDS *v.* HAY.

IN THE KING'S BENCH, MAY 26, 1791.

[*Reported in 4 Term Reports, 260.*]

TROVER for certain goods. The action was brought by the owner against the captain of the vessel in which they had been shipped; and the only question was, whether there was evidence of a conversion to maintain this action. The goods were left by the defendant in the hands of one Hawley, a wharfinger, for the plaintiff's use; and he might have had them at any time by sending there and paying the wharfage. But, previous to their being landed on the wharf, the plaintiff, intending to convey them from the vessel himself, expressly directed the defendant not to land them there, which the latter promised not to do, but nevertheless he did so. The defendant, by way of justification for this breach of orders and promise, attempted to set up a usage that every wharfinger, against whose wharf a vessel was moored for the purpose of unloading, as in the present case, was entitled to the wharfage fees for all goods unloaded therefrom, whether landed on the wharf or not; and that therefore the wharfinger had a lien thereon, of which it was not lawful to divest him. It appeared from several witnesses, who were examined as to this usage, that a claim of this kind had been made by the wharfingers in the port of London, which had sometimes been paid and sometimes not; but in their opinion it was well founded. And at all events there was a reasonable ground from the evidence to suppose that the captain in this instance had acted from an impression that the wharfinger had such a right. Lord Kenyon was of opinion, on an objection taken at the trial, that there was no evidence of a conversion; for, without laying stress on the supposed usage, the goods had been delivered to the wharfinger for the use of the defendant; and that the proper remedy against a carrier for not delivering goods pursuant to orders was by action on the case; but he nevertheless permitted the cause to proceed, reserving this point for the consideration of the court. The verdict was given for the plaintiff. And a rule having been obtained to show cause why the verdict should not be set aside, and a nonsuit entered,

*Bower* and *Kidd* now showed cause, contending, first, that the evidence of usage offered did not support the right of the wharfinger. The mere opinion of the witnesses is of no weight. Usage must be established either by reputation, or by the actual exaction of the demand. Of the former kind there was none; and of the latter there were (for aught appears) as many instances of denial to, as of compliance with, the demand; and the learned judge himself thought at the

trial that the usage was not satisfactorily established in point of fact. But even if it were, it could not be supported in point of law; as was held in *Stephen v. Coster*,<sup>1</sup> where the very question arose as to the wharfinger's right to wharfage, when the goods had not been landed on his wharf. And it is no answer to say that that case turned upon the construction of the 22 Car. II. c. 11, which enables the king by an order in council to regulate the rates of wharfage; for the question was also argued on the ground of the common law, and upon that ground as well as on the construction of the statute was the judgment given. It appears, too, on inquiry made since the trial of this case, that the demand for anchorage and moorage, which is different from wharfage, is paid by the captain of the vessel; and that it is customary when wharfage is paid for the goods not to charge for anchorage or moorage; and therefore the captain was plainly interested in putting these goods into the hands of the wharfinger, in which case it would be a clear conversion. But, secondly, even supposing the captain to have acted as he did merely on the supposition that the wharfinger had such a right, and without any intention of exonerating himself from a charge, yet it has been held that not only claiming property as one's own, but asserting the right of another over it, is, upon demand and refusal, evidence of a conversion. As in *Perkins*, assignee of *Hughes*, a bankrupt, against *Smith*, where it was found that the defendant sold the goods for the use of his master, the court held that trover would lie, because the taking upon him to dispose of another's property, though not for his own use, was a tortious act, and the gist of such an action. The same is the case of every sheriff against whom trover lies for refusing to deliver the goods of one person to another. *Cooper v. Chitty*.<sup>2</sup> And yet there is no pretence to say in any of those cases that the party intended to convert them to his own use. And it is said expressly in *Salk*. 655, pl. 4, that though trover does not lie against a carrier if the goods appear to have been really lost by negligence; yet if that do not appear, or if the carrier had them in custody when he denied to deliver them, it is good evidence of a conversion. Now this cannot be imputed to negligence, for it was a wilful disobedience of orders, and is therefore as strong evidence of a conversion as can be stated.

*Erskine*, *Mingay*, and *Lawes*, contra, admitted that demand and refusal were *prima facie* evidence of a conversion, till explained, but no more; for if conversion be not actually found on a special verdict in trover, judgment must be for the defendant. Now here the refusal was satisfactorily explained; for the goods were delivered to the wharf-

<sup>1</sup> 1 Bl. Rep. 413, 423.

<sup>2</sup> 1 Burr. 20.









inger expressly for the use of the plaintiff; and therefore his right to them, so far from being denied, was recognized. The delivery to the wharfinger was in the usual course of trade. There was no evidence of its being done collusively; and if done *bona fide* under an idea, whether well or ill founded, of a right in the wharfinger, trover, which is founded on a tort, will not lie; but the plaintiff has his remedy by an action on the case against the carrier for a misdelivery. The wharfinger may even be considered as the agent for the plaintiff; and all the cases of this kind, where trover has been maintained, such as *Perkins v. Smith* and *Cooper v. Chitty*,<sup>1</sup> have been either where the property has been altered by an actual sale, or the denial has been grounded on an assertion of property in some other person. But they are not applicable to the present case. If the plaintiff had intended to dispute the claim of wharfage, he might have done it by bringing his action against the wharfinger. But supposing it necessary for the defendant to justify his denial under the right of the wharfinger, all the evidence given was in support of such a right; and, however slight, it must be taken to be true, as none was opposed to it. The case of *Stephen v. Coster* appears to have turned altogether on the construction of the act of Car. II., for there was no evidence of a usage in that case. And with respect to what is said relative to the anchorage and moorage, it rests merely on assertion, of which the court can take no notice.

LORD KENYON, C. J. It is clear that the plaintiff is entitled to recover either against the defendant or the wharfinger; and if no wharfage be due, of which there was no satisfactory evidence, I think that this action may be maintained against the defendant.

ASHHURST, J. If the wharfage duty be not due, it is clear that trover will lie against the defendant. Or even if the defendant landed the goods on the wharf with the view of sheltering himself from the payment of the moorage duty, that also would subject him to this action.

BULLER, J. I am of opinion that the objection to the form of the action is not well founded. For the plaintiff gave express orders to the defendant not to land the goods on the wharf, to which the latter agreed at the time, but afterwards disobeyed those orders and delivered the goods into the possession of the wharfinger; now on these facts I think that trover will lie. I cannot go on the ground that the wharfinger was the plaintiff's agent; for, so far from it, the plaintiff expressly dissented to the goods being sent there. And if one man, who is intrusted with the goods of another, put them into the hands of a third person contrary to orders, it is a conversion. If a person take my horse to ride, and leave him at an inn, that is a conversion; for though I may have the horse on sending for him and paying for

<sup>1</sup> 1 Burr. 20.

the keeping of him, yet it brings a charge on me. So here the defendant, by putting these goods into the custody of the wharfinger, brought a charge on the plaintiff. And this is a deliberate act, it being done contrary to the orders of the owner, and therefore distinguishable from the case put at the bar of a misdelivery of goods, merely owing to a mistake. So stands the case independently of the evidence respecting the wharfage; but that is very material to be considered, because, if the wharfage duty be due, that will be an answer to the present action. The usage set up at the trial does not appear to be uniform; for, though several of the witnesses said that in their opinion it was due, yet opinion is no evidence, and in point of fact the duty has not always been paid in cases where the goods were not landed. The case in Bl. Rep. goes a great way to prove that no such payment can be exacted.

GROSE, J., of the same opinion.

On a subsequent day LORD KENYON said that the court had fully considered this case, and were of opinion that no new trial ought to be granted, and that the rule should be discharged.

*Per Curiam. Rule discharged.*

## YOUL v. HARBOTTLE.

AT NISI PRIUS, CORAM LORD KENYON, C. J., JUNE 7, 1791.

[Reported in 1 Peake, 49.]

TROVER for goods. The plaintiff had put the goods in question on board the defendant's packet-boat, to be carried from London to Gravesend. Another person coming to the defendant's house, and saying that these goods belonged to him, the defendant, under a mistake, delivered them to him.

Mingay, for the defendant, objected that upon this evidence the plaintiff must be nonsuited. Here was no evidence of a conversion; and though the defendant was liable to a special action on the case, yet trover could not be supported.

Erskine relied on the case of Syeds and Another v. Hay, determined last term, which, he said, showed this act of the defendant to be a conversion.

LORD KENYON. That case was determined on such peculiar circumstances, that it is hardly possible it should ever apply as an authority in a case not exactly parallel with it. I agree that when a carrier loses goods by accident, trover will not lie against him; but when he delivers them to a third person, and is an actor, though under a mistake, this species of action may be maintained.

*Verdict for plaintiff.*











NIXON AND OTHERS, ASSIGNEES OF WHITESETT, A BANKRUPT,  
v. JENKINS.

IN THE COMMON PLEAS, MAY 10, 1793.

[Reported in 2 H. Blackstone, 135.]

WHITESETT, in contemplation of insolvency, and with a view to defeat the claims of his creditors, sold a large quantity of goods to the defendant Jenkins. Soon after the sale he committed an act of bankruptcy, and his assignees brought this action of trover to recover the value of the goods. But having failed to prove at the trial a demand and refusal to deliver, the Lord Chief Justice was of opinion that they could not recover, there being no evidence of a conversion. But it was agreed that the opinion of the court should be taken, and a rule was accordingly obtained to show cause why a nonsuit should not be entered; against which *Lawrence*, Serjt., now showed cause. He contended that a demand and refusal were necessary to support an action of trover only in cases where the possession was originally lawful; here it was a wrongful possession, inasmuch as the bankrupt had no right to make a fraudulent sale of his effects in order to cheat his creditors. And he cited 1 Sid. 264; 1 Leon. 223; 4 Burr. 2477; Hob. 187.

But the court held that a demand and refusal were necessary to maintain the action. When the sale was made the parties were competent to contract; there was no unlawful taking of the goods, though the transaction was liable to be impeached by the assignees. They might either affirm or disaffirm the contract; and if they thought proper to disaffirm it, they ought to have demanded the goods, a refusal to deliver which would have been evidence of a conversion.

*Rule absolute for entering a nonsuit.*

## SOLOMONS v. DAWES.

AT NISI PRIUS, CORAM LORD KENYON, C. J., FEBRUARY 11, 1794.

[Reported in 1 *Espinasse*, 83.]

TROVER for a box and jewels. The demand had been made by the plaintiff's wife. The defendant had detained them till paid a demand he set up against the plaintiff for lodging.

Per LORD KENYON. In an action of trover, where the demand of the things for which the action is brought is not made by the plaintiff

himself, who is the owner, but by another person on his account, and the defendant refuses to deliver them, on the ground that he does not know to whom the things belong, and therefore keeps them till that is ascertained; or that the person who applies is not properly empowered to receive them; or until he is satisfied by what authority he applies,—that shall not be deemed such a refusal as shall be evidence of a conversion sufficient to support this action.<sup>1</sup>

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### SHIPWICK v. BLANCHARD.

IN THE KING'S BENCH, MAY 15, 1795.

[*Reported in 6 Term Reports, 298.*]

AN action of trover for certain goods was brought in order to try the bankruptcy of one Grunden, who was the landlord of the plaintiff for the house she inhabited. The defendant was his assignee under the commission. Heath, J., before whom this was tried at the last assizes at York, reported that on the 8th November, 1794, one Whitley, by order of the defendant as assignee, entered the plaintiff's house, and seized and distrained her goods for rent in arrear to the bankrupt. He declared this to the plaintiff at the time of the seizure, and gave her a written notice to that effect. The plaintiff, to redeem her goods, paid him £5 for rent and 40s. for the expenses. It appeared, further, that the debt of the petitioning creditor accrued and became due after the reputed acts of bankruptcy of Grunden. It was objected by the counsel for the defendant at the trial that this did not amount to a conversion; but the learned judge, being of opinion that it was equivalent to a sale to a stranger, which had been deemed to be a conversion, and that trover was the proper action for trying questions of bankruptcy, overruled the objection, and the plaintiff obtained a verdict.

*Chambre* on a former day obtained a rule to show cause why the verdict should not be set aside, on the ground that no actual conversion was proved; that it was not in evidence that the defendant had laid his hands on any of the goods in question, but had merely given a notice in writing to the plaintiff that he seized such and such goods, enumerating them, as a distress for rent in arrear. Secondly, that there was no conversion in point of law.

*Law* showed cause. The fact of obliging the plaintiff to advance money in order to redeem her goods from a wrongful distress amounts

<sup>1</sup> See *Connah v. Hale*, 23 Wend. 471. — *ED.*











in law to a sale, which is a conversion. It is immaterial whether the goods were purchased by a stranger or bought in again by the owner. But even if that were otherwise, yet the extorting of 40s. by virtue of having possessed himself tortiously of the goods under a pretended legal right is of itself a conversion. There is no occasion for a party to take possession of goods by laying his hands upon them; if he claim and assert a dominion over them, especially by turning the possession of them to his own profit, that is a clear possession in law to subject the wrong-doer to an action of trover.

*Chambre* and *Holroyd*, in support of the rule. In order to maintain trover, the goods must be taken or detained with intent to convert them to the taker's own use, or the use of those for whom he is acting. Now here the goods were not taken at all, or if they were, they were taken under a special authority, and certainly not for the use of the party. There must be a taking in fact, and an exclusive possession in order to maintain trover, though there need not be a manual taking of the whole property. Taking the key of the warehouse, in which goods are deposited, or taking a part of the goods in the name of the whole, is sufficient. 6 Mod. 215. But here there was no taking in fact, but only a notice to the plaintiff that the things were taken without any removal of them or actual laying of hands on any part of them. There was no act amounting to a trespass, without which in this case trover could not be maintained. But at any rate the goods were not taken for the use of the party, but as a distress for rent; he did not claim the disposition of them at the time: they were in *custodia legis*. If the distress were wrongful, the party might have replevied; or if the money were wrongfully paid, it might be recovered back again in another form of action: but this was no sale of the goods, or in the nature of one. It was a payment, not for the goods, but for the rent, *eo nomine*, and the costs of the distress. The plaintiff acquiesced in the distress at the time, and the payment was made voluntarily in order to get rid of the distress, and not as a price for the goods.

The court took time to consider of this case; and now their opinion was delivered by

LORD KENYON, C. J. This case stood over on account of some doubts in my mind whether an action of trover could be supported under these circumstances; I have looked into the cases, and I have removed those doubts; though I must observe that similar doubts have been before entertained in cases of this kind. In *Bunbury*, 67, it was objected by the Attorney-General that trover would not lie against a custom-house officer for seizing goods not liable to seizure, because it could not be said that the officer had converted them to his own use; and the Chief Baron Bury, inclining to be of that opinion, the plaintiff chose to be non-

suit. The same case (as I suppose) is to be found in page 80 of the same book, though the form of the action appears to have been changed, and there the opinion of the court seems to have accorded with that of the Chief Baron. However, both those cases were fully considered in *Tinkler v. Poole*, when this court were of opinion that trover would lie against a custom-house officer for seizing the plaintiff's goods, as it turned out that the seizure was not founded in law, though Lord Mansfield, who tried the cause, had paused at *Nisi Prius* on account of the cases cited from Bunbury. So here, inasmuch as it appears that the distress made by the defendant under the assignee of the bankrupt was illegally made, because he was not the legal assignee, the petitioning creditor's debt not having accrued until after the act of bankruptcy, this action of trover may be maintained against the defendant who illegally made the distress. My doubts are removed by the case in Burrow.

*Rule discharged.*<sup>1</sup>

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SEVERIN v. KEPPEL.

AT NISI PRIUS, CORAM LORD ELLENBOROUGH, C. J., JUNE 3, 1803.

[Reported in 4 *Espinasse*, 156.]

THIS was an action of trover for several articles of plate and plated goods, stated in the declaration.

The defendant was a silversmith; and they had been delivered to him for the purpose of putting glasses into them. He had been applied to on many occasions for the articles so delivered to him; he made excuses, and said the glass was not come from the glass-blower's; there was no denial at any time to deliver the goods, but rather excuses for not delivering them: however, in one instance, the defendant admitted that the glass was come home; but he then said, his wife was out, and he could not deliver them.

He afterwards delivered the plated goods, and said he had sent the silver ones home; which was not true.

It was objected by the defendant's counsel that on the evidence given there was no conversion sufficient to support the action of trover.

*Erskine*, for the plaintiff, contended that the defendant having, in the last instance, admitted his possession of the goods, and having made a frivolous and false pretence for not delivering the articles,

<sup>1</sup> *Abercrombie v. Bradford*, 16 Ala. 560; *Reynolds v. Shuler*, 5 Cow. 323; *Phillips v. Hall*, 8 Wend. 610; *Connah v. Hale*, 23 Wend. 462, acc. — ED.











after his repeated excuses before made, that it was evidence of conversion sufficient to go to the jury; particularly from the circumstance of his having returned the plated goods, and pretended to have sent home the other; which was not the case.

LORD ELLENBOROUGH said, he thought the plaintiff should be nonsuited, as there was no evidence to sustain the action in its present form; that what begins in contract, a non-performance of what the party so undertakes to do, or a bare non-delivery of what he undertakes to deliver, is not to be considered as of itself amounting to a tortious conversion. There was a case in the Court of King's Bench some time ago, in which that principle was recognized. It was an action of trover against a carrier for not delivering goods. If a carrier says he has the goods in the warehouse, and refuses to deliver them, that will be evidence of conversion, and trover may be maintained; but not for a bare non-delivery, without any such refusal. So in this case, the goods were delivered to the defendant to work upon. There was no evidence of any refusal by him to deliver them; but, on the contrary, he makes excuses for not doing it. The plaintiff must be called.<sup>1</sup>

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### DRAKE v. SHORTER.

AT NISI PRIUS, CORAM LORD ELLENBOROUGH, C. J., JUNE 9, 1803.

[*Reported in 4 Espinasse, 165.*]

TROVER for a boat. Plea of general issue.

The case stated on the part of the plaintiff was, that the defendant, who was employed in an invention for making a vessel sail against wind and tide, had employed the plaintiff to work on her; that while the vessel was so working on, she took fire; that the defendant took a boat belonging to the plaintiff, to endeavor to extinguish it, but that she sunk, and was lost.

*Garrow*, for the defendant, stated his defence to be, that while the plaintiff was working on the vessel, it was his duty to have taken care of her, and that the interference, in this case, was to prevent the fire spreading, by means of which the accident happened; which he contended was lawful.

LORD ELLENBOROUGH said, that if the fact was so, he thought it amounted to a defence; that what might be a tort under one circumstance, might, if done under others, assume a different appearance; as, for example, if the thing for which the action was brought, and

<sup>1</sup> See *Holbrook v. Wight*, 24 Wend. 177. — Ed.

which had been lost, was taken to do a work of charity, or to do a kindness to the party who owned it, and without any intention of injury to it, or of converting it to his own use; if, under any of these circumstances, any misfortune happened to the thing, it could not be deemed an illegal conversion; but as it would be a justification in an action of trespass, it would be a good answer to an action of trover.

The defendant failed in proving the circumstances as to the ship being in the plaintiff's care; so that the accident of the fire proceeded from the defendant himself; and the plaintiff had a verdict.<sup>1</sup>

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### M'COMBIE v. DAVIES.

IN THE KING'S BENCH, JUNE 21, 180.

[*Reported in 6 East, 538.*]

IN trover for a certain quantity of tobacco, tried at the sittings after Michaelmas term, 1804, at Guildhall, before Lord Ellenborough, C. J., the plaintiff was nonsuited, on the ground that there was no conversion by the defendant. A motion was made in Hilary term last to set aside the nonsuit and for a new trial, and the opinion of the court was reserved on the following facts: The plaintiff, a merchant in Aberdeen, had employed one Coddan, an accredited broker in the tobacco trade, and a dealer in tobacco on his own account, to purchase for him some tobacco, which Coddan accordingly did; and the tobacco in question

<sup>1</sup> COKE, C. J. "There was a case resolved in the C. B. when I was there, concerning Gravesend barge, in which were a great number of passengers; one there had a pack of great value and of great weight in the barge. There suddenly happened a very great storm, and they were all in great danger, and were, for their own safety, enforced to throw out a great part of the goods for the safeguard of their lives which were then in the barge; amongst which goods, for the lightening of the barge, this pack of goods was thrown over; afterwards, he which was the owner of this pack, brought his action upon the case against the bargeman, for these his goods thus cast over; and we all there did resolve it clearly that this being the act of God, this sudden storm, which occasioned the throwing over of the goods, and could not be avoided, and for this cause he recovered nothing; upon this reason is the case in 6 Eliz. in Dalison's Reports, where one was bound to keep and maintain the sea-walls from overflowing; if this happen by his negligence, this shall be waste, otherwise if it so happen by the act of God suddenly, and so unavoidable. The whole court agreed with him herein." *Bird v. Astock*, 2 Bulst. 280.

See also 1 Roll. Abr. 6, pl. 5; *Kennet v. Robinson*, 2 J. J. Marsh. 84; *Nelson v. Merriam*, 4 Pick. 249; *Wilson v. McLaughlin*, 107 Mass. 587; *Payne v. Robinson*, Harp. 279; *Nelson v. Whetmore*, 1 Rich. 323; *Sharp v. Nesmith*, 6 Rich. 31; *Waller v. Parker*, 5 Coldw. 476. Conf. *McCarroll v. Stafford*, 24 Ark. 224; *R. R. Co. v. Holt*, 8 Ga. 161. — ED.









was part of it. But the defendant had no knowledge of the transaction between the plaintiff and Coddan. Coddan, the broker, bought the tobacco in his own name whilst it was in the king's warehouse, and had it transferred to himself in his own name in the king's warehouse, where it remained subject to the payment of the duties, as is usual, till the tobacco is actually delivered out of the warehouse. Coddan being in want of money, pledged the tobacco in his own name with the defendant for a sum of money, and transferred it into the defendant's name in the king's warehouse. Afterwards an application was made to the defendant, on the part of the plaintiff, for a delivery of the tobacco in question. The defendant answered that he had advanced money to Coddan thereon; that he did not know M'Combie, and could not transfer it but to Coddan's order, and not till his advances were paid. On the 6th and 7th of November the following orders were addressed to the defendant. "B. A. — L 237, 649, 597, 659, 508.

"Mr. Davies, please to deliver to the order of Mr. Thomas M'Combie the above five hogsheads of tobacco, his property.

"Yours, &c.,

"Nov. 6, 1804.

J. R. CODDAN."

"Mr. Davies, I have to request you will immediately deliver to me five hogsheads of tobacco, marked and numbered, &c. (as before); the same being my property, placed in your hands by my broker, J. R. Coddan, whose order for their delivery I now hand you; and have to observe that if you do not deliver them over to me I shall be under the necessity of entering an action against you to enforce their delivery.

"Yours, &c.,

"London, 7th November.

T. M'COMBIE."

The defendant received the said orders, but said that he should not deliver the tobacco until he was paid the money he had advanced on them to Coddan. The tobacco still remains in the king's warehouse, the duties not yet being paid thereon, entered in the books at the king's warehouse in the name of the defendant.

*W. Harrison*, for the plaintiff. The tobacco having been purchased by the broker for the plaintiff, his principal, the plaintiff had the complete legal property and the right of possession of it, and the broker had no right afterwards to pledge it to the defendant; for this was a pledge, and not a sale. The king had only a lien upon it for the duty while it remained in his warehouse, and on payment of the duty the person in whose name it is entered may at any time remove it. It was as much in the defendant's possession while it remained in the king's









## POWELL v. SADLER.

AT NISI PRIUS, CORAM LORD ELLENBOROUGH, C. J., SITTINGS AFTER  
EASTER TERM, 1806.

[*Reported in Paley's Principal and Agent (3d edition), 80.*]

TROVER for three horses. Plaintiff had sent the horses to defendant to be sold the next day; defendant's clerk told him the next day would not be so good a time to sell them as the following sale day; in consequence of which the plaintiff said he would send for them back again, which he did the next evening, but they had been sold. In a conversation concerning the sale, the defendant said, "it was a mistake of his clerk, for which he was not answerable." *Garrow*, for the defendant, insisted that there was no evidence of a conversion. LORD ELLENBOROUGH, C. J. I am of opinion that a conversion has been proved; the horses were intrusted to the defendant for a qualified purpose, which he has admitted was not conformed to. Where goods are committed to one for a qualified purpose, any deviation from it in the disposition of them is a conversion; "as if a man borrow a horse to ride, and leave him at an inn, it has been held to be a conversion."<sup>1</sup>

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 ATTERSOL v. BRIANT.

AT NISI PRIUS, CORAM LORD ELLENBOROUGH, C. J., JULY 22, 1808.

[*Reported in 1 Campbell, 409.*]

TROVER for five thousand bricks. The case opened on the part of the plaintiff was, that the bricks in question had been sent to the de-

<sup>1</sup> *Loeschman v. Machin*, 2 Stark. 811; *Samuel v. Morris*, 6 C. & P. 620; *Cooper v. Willomatt*, 1 C. B. 672; *Van Amringe v. Peabody*, 1 Mason, 440; *Blakeley v. Rud-dell*, Hempst. 18; *St. John v. O'Connell*, 7 Port. 466; *Robinson v. Hartridge*, 13 Fla. 501; *Yeldell v. Shinholster*, 15 Ga. 189; *Seago v. Pomeroy*, 46 Ga. 227; *Haas v. Damon*, 9 Iowa, 589; *White v. Wall*, 40 Me. 574; *Webber v. Davis*, 44 Me. 147; *Carpenter v. Hale*, 8 Gray, 157; *Simpson v. Carleton*, 1 All. 109; *Carroll v. McCleary*, 19 Mich. 93; *Johnston v. Whittemore*, 27 Mich. 463; *White v. Phelps*, 12 N. H. 382; *Murray v. Burling*, 10 Johns. 172; *Kennedy v. Strong*, 14 Johns. 128; *Chandler v. Belden*, 18 Johns. 157; *Bates v. Conkling*, 10 Wend. 389; *Vincent v. Conklin*, 1 E. D. Smith, 203; *Campbell v. Parker*, 9 Bosw. 322; *Jaroslauski v. Saunderson*, 1 Daly, 232; *Covell v. Hill*, 6 N. Y. 374; *Boyce v. Brockway*, 31 N. Y. 490; *Strong v. Nat. Mec. Bank Assoc.*, 45 N. Y. 718; *Ogden v. Lathrop*, 35 N. Y. Superior Ct. R. 73; *Hope*

fendant, to be carried by him as a common carrier, and delivered to one Stiles; that he had asserted to the plaintiff he had delivered them to Stiles accordingly; but that, in truth, he had not done so, and they had never reached Stiles's hands. Under these circumstances, it was contended, the defendant must be taken to have converted the bricks to his own use.

LORD ELLENBOROUGH, however, said that the facts stated were not sufficient evidence of a conversion to support an action of trover. Although the defendant might have been guilty of a tort respecting the bricks, it did not appear that he was guilty of the specific tort mentioned in the declaration. The action was, therefore, misconceived.

*Plaintiff nonsuited.*<sup>1</sup>

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SMITH, ASSIGNEE OF TENANT, A BANKRUPT v. YOUNG.

AT NISI PRIUS, CORAM LORD ELLENBOROUGH, C. J., NOVEMBER 1, 1808.

[*Reported in 1 Campbell, 439.*]

TROVER for a lease assigned by the bankrupt to the defendant after an act of bankruptcy.

The witness, to prove the demand, stated that he had verbally required the defendant to deliver up the lease, and at the same time served upon him a notice in writing to the like effect.

When the lease was demanded, the defendant said, "he would not deliver it up; but it was then in the hands of his attorney, who had a lien upon it for a small sum of money due to him."

*Garrow*, for the plaintiff, contended that the attorney's possession of the lease was in law the possession of the defendant, who must be considered as having a complete control over it, and that the lien did not, under these circumstances, prevent the refusal to deliver up the deed from amounting to a conversion.

LORD ELLENBOROUGH. The defendant would have been guilty of a conversion if it had been in his power; but the intention is not enough. There must be an actual tort. To make a demand and re-

*v. Lawrence*, 1 Hun. 317; *Carraway v. Burbank*, 1 Dev. 306; *Etter v. Bailey*, 8 Penn. 442; *Harris v. Saunders*, 2 Strobb. Eq. 370; *Garvin v. Luttrell*, 10 Humph. 16; *Ainsworth v. Bowen*, 9 Wis. 348; *Couillard v. Johnson*, 24 Wis. 533, acc. *Conf. Downer v. Rowell*, 24 Vt. 343, acc. — ED.

<sup>1</sup> *Robinson v. Austin*, 2 Gray, 534; *Scovill v. Griffith*, 12 N. Y. 509; *Briggs v. N. Y. C. R. R. Co.*, 28 Barb. 515, acc. — ED.











fusal sufficient evidence of a conversion, the party, when he refuses, must have it in his power to deliver up or to detain the article demanded.

*Plaintiff nonsuited.*<sup>1</sup>

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BOARDMAN v. SILL.

AT NISI PRIUS, CORAM LORD ELLENBOROUGH, C. J., SITTINGS  
AFTER MICHAELMAS TERM, 1809.

[Reported in 1 Campbell, 410.]

TROVER for some brandy, which lay in the defendant's cellars, and which when demanded he had refused to deliver up, saying it was his own property. At this time certain warehouse rent was due to the defendant on account of the brandy, of which no tender had been made to him. The *Attorney-General* contended that the defendant had a lien on the brandy for the warehouse rent, and that till this was tendered trover would not lie. But LORD ELLENBOROUGH considered that, as the brandy had been detained on a different ground, and as no demand of warehouse rent had been made, the defendant must be taken to have waived his lien, if he had one, which would admit of some doubt.

*The plaintiff had a verdict.*<sup>2</sup>

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DUFRESNE v. HUTCHINSON.

IN THE COMMON PLEAS, JULY 7, 1810.

[Reported in 3 Taunton, 117.]

THIS was an action of trover brought by the plaintiff, who was a manufacturer at Leeds, against the defendant, who was a broker in London, to recover the value of certain cloths which had been con-

<sup>1</sup> See *Edwards v. Hooper*, 11 M. & W. 363. — ED.

<sup>2</sup> *Knight v. Harrison*, Saunders's Pl. & Ev. 641; *Thompson v. Trail*, 6 B. & C. 36; *Jones v. Tarleton*, 9 M. & W. 675; *Weeks v. Goode*, 6 C. B. N. s. 367; *Dirks v. Richards*, 4 M. & Gr. 574; *Clark v. Rideout*, 39 N. H. 238; *Judah v. Kemp*, 2 Johns. Cas. 411; *Everett v. Saltus*, 15 Wend. 474; *Saltus v. Everett*, 20 Wend. 267; *Holbrook v. Wight*, 24 Wend. 169; *Buckley v. Handy*, 2 Miles, 449; *West v. Tupper*, 1 Bail. 193, acc. Conf. *Scarfe v. Morgan*, 4 M. & W. 270; *White v. Gainer*, 1 C. & P. 324; s. c. 2 Bing. 23; *Spence v. McMillan*, 10 Ala. 583; *Thompson v. Rose*, 16 Conn. 85; *Dows v. Morewood*, 10 Barb. 183; *Hanna v. Phelps*, 7 Ind. 21. — ED.

signed by the plaintiff to the defendant for sale upon commission. Upon the trial of this cause at Guildhall, at the sittings after last Hilary term, before Mansfield, C. J., it appeared that the plaintiff had delivered the goods to the defendant, valued at the invoice price of £972 1s. 2d., with positive instructions not to sell even at one quarter per cent below that price. The defendant having advanced money to the plaintiff on the credit of these goods, and finding himself unable to dispose of them at the price prescribed, became impatient, and placed the goods in the hands of certain other factors, named Bowdler and Morley, to be sold at all events for what they would produce, on the sole account of himself, the defendant, he having a lien on the goods for the advances he had made. Morley, being called as a witness, declared that he would not have paid over the proceeds to any person except the defendant. It appeared, however, that the plaintiff ultimately knew of the delivery of the goods to Bowdler and Morley, and consented that they should sell them at a price seven and a half per cent below the invoice price fixed; to which they answered, that so small a reduction was merely nugatory; but it did not appear that the plaintiff consented to any further diminution of the price. Bowdler and Morley sold the goods for somewhat more than £600, being the best price they could obtain. The plaintiff had sued out a writ in a joint action against Bowdler and Morley and the defendant, which he dropped upon receiving from Bowdler and Morley alone the sum of £200, and then commenced the present action against the defendant. The jury found a verdict for the plaintiff for the amount of the original invoice price, deducting therefrom the sums which the defendant had advanced to the plaintiff, and the seven and a half per cent which the plaintiff had consented to abate.

*Cockell*, Serjt., had, in the last term, obtained a rule *nisi* for entering either a nonsuit or a verdict for nominal damages only, upon two grounds: first, that as the goods lawfully came into the hands of the defendant to be sold on commission, if he, either in person or by his agents, improperly and improvidently sold them, the plaintiff's remedy was by an action upon the case, not by an action of trover; and, secondly, that supposing trover would lie, the sale actually made had furnished the true criterion of the real value of the goods, which was the proper measure of damages; and since the plaintiff had consented that Bowdler and Morley should sell, and repay the defendant the advances he had made, the plaintiff was entitled to recover only the residue of the actual produce that remained after making that payment.

*Best*, Serjt., now showed cause. He contended, upon the author-









ity of *Syeds v. Hay*, that where a bailee disposes of goods in a manner contrary to the directions of the bailor, as here, trover lies, and that the parting with the goods at a less price than the plaintiff had fixed on them was a conversion by the defendant. He also cited the case of *Youle v. Harbottle*, where Lord Kenyon, C. J., held, that if a carrier delivers goods to a stranger, he thereby becomes an actor, and is guilty of a conversion, for which trover lies. The defendant in the present case was an actor, for Bowdler and Morley held themselves responsible to him only; and the money which they paid to the plaintiff was not received by him in affirmance of their act, but was paid by way of buying off the action commenced against them for their misfeasance.

*Cockell*, contra, was stopped by the court.

MANSFIELD, C. J., observed, that it clearly appeared that the plaintiff had authorized Bowdler and Morley to sell at a price not more than seven and a half per cent below the invoice price. He could not therefore maintain trover against the defendant for the goods sold by them, whom the plaintiff had constituted his own brokers. The plaintiff had also brought an action against them, and received £200 in compensation for the injury of which he complained.

LAWRENCE, J. Since the plaintiff sued out a writ against Bowdler and Morley jointly with the defendant, it must be taken that he meant to declare in such a form of action in which he could recover; it must be presumed, therefore, that he would declare for money had and received, not in trover; for the plaintiff had given to Bowdler and Morley an authority to sell, and therefore could not recover against them in trover. But by declaring for money had and received, the plaintiff would affirm the sale; besides, if trover had been the right form of action, it would be a question whether the discharge made to one tortfeasor would not be a release to all; if it were otherwise, the plaintiff might get paid by each defendant to the whole amount of the injury sustained.

*Rule absolute to enter a nonsuit.*<sup>1</sup>

<sup>1</sup> *Marr v. Barrett*, 41 Me. 403; *Bissell v. Huntington*, 2 N. H. 142; *Sarjeant v. Blunt*, 16 Johns. 74, acc. *Conf. Libley v. Story*, 8 Vt. 15; *Palmer v. Jarmain*, 2 M. & W. 282; *Stierneld v. Holden*, 4 B. & C. 5; *Harris v. Schultz*, 40 Barb. 315. — Ed.

## GREEN v. DUNN.

AT NISI PRIUS, CORAM LORD ELLENBOROUGH, C. J., SITTINGS  
AFTER MICHAELMAS TERM, 1811.

[Reported in 3 Campbell, 215.]

TROVER for timber, which defendant found on his premises, and which had been deposited there by the permission of the servant of the former occupier.

The plaintiff, to whom the timber belonged, having demanded it of the defendant, the latter said, "If you will bring any one to prove it is your property, I will give it you, and not else."

LORD ELLENBOROUGH. This is a qualified refusal, and no evidence of conversion. *Plaintiff nonsuited.*<sup>1</sup>

## LOVELL v. MARTIN.

IN THE COMMON PLEAS, MAY 12, 1813.

[Reported in 4 Taunton, 799.]

THE plaintiff being possessed of a bill drawn by T. White, at Portsmouth, on the 7th of July, 1810, at six months after date, on Smith, Atkins, & Co., in favor of the plaintiff or his order, and accepted with this direction, "with Messrs. Martin, Stone, & Martin," indicating that the bill would be paid at their house in London, indorsed it, and casually lost it. On the 4th of August he wrote to Smith, Atkins, & Co., stating the circumstance; and Smith, Atkins, & Co., in consequence, applied to the defendants, requesting that they would not pay or discount the bill if offered: on the 7th, the defendants wrote back to the plaintiff that there was little chance of the bill being offered for discount, but if not recovered, care should be taken that it should not be paid when due, of which they requested that he would remind them. On the 2d of January, 1811, the plaintiff wrote to remind the defendants that the bill would soon fall due, viz., on the 10th of January; to which they answered that they had long since discounted it for Powell, a bill broker, who was their customer. The bill had in fact been picked up by a child, from whom Powell had it; the defendants discounted it for him, and at maturity charged the account of Smith & Atkins with the payment of the bill, noted it, wrote a discharge on the back of the bill, and delivered it up to Smith, Atkins, & Co., as a voucher of their account. The plaintiff,

<sup>1</sup> Gunton v. Nurse, 2 B. & B. 447, acc. — ED.











without further communication, brought this action. His declaration contained two special counts in tort, alleging that the bill was stolen by persons unknown, and charging the defendants with having prevented the plaintiff from recovering it, and a count in trover. Upon the trial of the cause at the sittings after Trinity term, 1812, before Mansfield, C. J., it appearing that the first two counts incorrectly described the transaction, the plaintiff resorted to the last. Lens, Serjt., for the defendants, objected that a previous demand of the bill, and refusal to deliver it, was necessary as evidence of a conversion; but the plaintiff on that count obtained a verdict.

*Lens*, in Michaelmas term, 1812, obtained a rule *nisi* to set aside the verdict and enter a nonsuit.

*Shepherd* and *Best*, Serjts., in this term, showed cause against the rule. They urged that the defendants had been guilty of a complete conversion of the bill, having appropriated it to their own use by debiting Smith, Atkins, & Co. with the amount, after they had discounted it, and delivering up the bill to Smith, Atkins, & Co. The case was the same as if the defendants had carried the bill to Smith, Atkins, & Co., and received the amount from them. They took a bill belonging to the plaintiff, and gave it up to another, under such circumstances that they could not possibly get it back again. This was a conversion.

*Lens* and *Vaughan*, Serjts., *contra*. If the plaintiff was entitled to the bill, he should have demanded it. There was neither demand nor refusal. The plaintiff neither shows an absolute destruction of the subject-matter, nor such an alteration of it as to prevent his having it in the same plight as before. If the plaintiff has a right to the bill, he may, upon obtaining possession thereof, still sue on it. But it was incumbent on the plaintiff to show that Powell, who was apparently the indorsee, had not a good title to the proceeds of the bill by affecting him with notice of the loss or theft; for it is possible that Powell took it without that notice; the noting was a perfectly nugatory act.

HEATH, J. Under the circumstances of this case, the count in trover may be maintained. The defendants have improperly discounted the bill; they have sent it to Smith & Atkins as their voucher.

CHAMBRE, J. I am of the same opinion. I think there is complete evidence of a conversion. The doctrine of the defendants' counsel applies to detinue, not to trover; where the circumstances amount to a complete conversion, there is no need of a demand. The discounting the bill, and applying it to the defendant's own use, is a purchase of the bill by the defendants, after notice of the plaintiff's title; but not only that: they have made use of it as a discounted bill. The writing a receipt on it was a further act of conversion.









direction in point of law, *Perkins v. Smith* was cited, and it was contended that the defendant being a tortfeasor, no authority that he could derive from his master would excuse him from being liable in this action.

*Park*, who now showed cause, referred to the report of *Perkins v. Smith*, in *Sayer*, 40, and said, that the decision went too far, and that it had not been approved of by *Lawrence, J.*, when cited to him on the western circuit. And he took this difference, that there the defendant received the goods with knowledge that the bankrupt had absconded and shut up shop. But in this case no demand was made until two years after the purchase; therefore it would be a great hardship if the defendant were to be liable in respect of a demand, which from the lapse of time it is impossible to comply with.

*Topping* and *Richardson*, contra, argued that the very assuming to dispose of another man's property was a conversion, and cited *M'Combie v. Davies* in support of that position; and in *Potter, Assignee v. Starkie*,<sup>1</sup> the court held the sheriff liable in trover, though he seized, sold, and paid over the money before commission issued, and before any notice, saying this necessarily followed from *Cooper v. Chitty*,<sup>2</sup> for it was an unlawful interference with another's goods.

LORD ELLENBOROUGH, C. J. The only question is, whether this is a conversion in the clerk, which undoubtedly was so in the master. The clerk acted under an unavoidable ignorance and for his master's benefit when he sent the goods to his master; but nevertheless his acts may amount to a conversion; for a person is guilty of a conversion who intermeddles with my property and disposes of it, and it is no answer that he acted under authority from another, who had himself no authority to dispose of it. And the court is governed by the principle of law, and not by the hardship of any particular case. For what can be more hard than the common case in trespass, where a servant has done some act in assertion of his master's right, that he shall be liable, not only jointly with his master, but if his master cannot satisfy it, for every penny of the whole damage; and his person also shall be liable for it; and what is still more, that he shall not recover contribution?

LE BLANC, J. I think the rule of law is very different from what I considered it at the trial. The great struggle made at the trial was, whether the goods were for *Heathcote* or not; but that makes no difference if the defendant converted them. And here was a conversion by him long before the demand. *Per Curiam. Rule absolute.*<sup>3</sup>

<sup>1</sup> Exch. M. T. 1807.

<sup>2</sup> 1 Burr. 20.

<sup>3</sup> *Cranch v. White*, 1 B. N. C. 414; *Davies v. Vernon*, 6 Q. B. 443; *Edgerly v. Whalan*, 106 Mass. 307; *Flanders v. Colby*, 28 N. H. 34; *Thorp v. Burling*, 11 Johns. 285, acc. — ED.

## FORSDICK v. COLLINS.

AT NISI PRIUS, CORAM LORD ELLENBOROUGH, C. J., FEBRUARY 13,  
1816.

[*Reported in 1 Starkie, 173.*]

TROVER for the value of a block of Portland stone.

The stone had been placed by the plaintiff on the land adjoining some shells' of houses, which he had purchased in Hunter Street. The defendant afterwards coming into possession of the land, refused to permit the plaintiff to carry the stone away, and afterwards removed it himself to Burton Crescent Mews.

*Puller*, for the defendant, contended that he had a right to remove it from his own premises.

LORD ELLENBOROUGH. But he is not justified in removing it to a distance. In an action of trespass at the suit of the owner, he must in his justification have alleged that he removed it to some adjacent place for the use of the owner; he could not have justified this removal.

*Puller* insisted that no sufficient demand had been proved.

LORD ELLENBOROUGH. A demand is unnecessary where the party has been guilty of a conversion, and he is guilty of a conversion where he oversteps the authority of law; here the defendant overstepped that authority by removing the property to a distance.

*Verdict for the plaintiff.*

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HURST v. GWENNAP.

AT NISI PRIUS, CORAM LORD ELLENBOROUGH, C. J., SITTINGS  
AFTER TRINITY TERM, 1817.

[*Reported in 2 Starkie, 306.*]

THIS was an action of trover, brought by the plaintiffs as the assignees of Foster, a bankrupt, to recover the value of certain books.

Foster was a bookseller, and on the 14th of June the defendant called at his shop and purchased two books of the value of £35 and £25, on sale and return. An act of bankruptcy had then been committed, but it did not appear that the defendant had any knowledge of the bankruptcy. Four days after the sale a commission of bankrupt was sued out against Foster. The assignees under the commission afterwards applied to the defendant to know whether he intended to keep the books or to return them, and he informed them that he should keep









them. The assignees afterwards applied for payment of the amount, and sent in a bill of parcels, making the defendant debtor to Foster, and requesting payment to themselves as assignees.

The defendant answered that Foster was indebted to him, and that he was ready to set off the price of the books. No subsequent demand of the books had been made before the action was brought, and the books still remained in the possession of the defendant.

*Gurney*, for the defendant, contended that the assignees were not entitled to maintain an action of trover against the defendant, who had bought the goods in the usual course of trade, and knew nothing of the bankruptcy. That the assignees having applied to the defendant to know whether he would keep the books, and on his determination so to do, having demanded payment, had thereby affirmed the sale, and could not afterwards consider him as guilty of a conversion, and that at all events a subsequent demand was necessary. But

LORD ELLENBOROUGH was of opinion that the action was maintainable, since the very act of taking the goods from one who had no right to dispose of them was in itself a conversion.

*Verdict for the plaintiff.*

In the ensuing term *Gurney* moved for a rule to show cause why there should not be a new trial on the grounds which he had urged before, but the court refused a rule *nisi*.<sup>1</sup>

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## FEATHERSTONHAUGH v. JOHNSTON.

IN THE COMMON PLEAS, APRIL 13, 1818.

[*Reported in 8 Taunton, 237.*]

TROVER. At the trial of the cause before Park, J., at the sittings at Guildhall after the last term, it appeared that the plaintiff agreed to send a cargo of bottles by a ship of one Humble, from Sunderland to London. A dispute afterwards arose respecting the payment of freight and demurrage, whereupon the ship was ordered by Humble to sail, and the bottles were consigned by him to the defendant, who, without notice of any adverse claim, sold a part. Afterwards the plaintiff informed the defendant that the bottles were his property, and demanded to have them delivered up to his disposal; to which the defendant answered that the greater part had been already sold. It was contended at the trial that the defendant was liable in this action only for the value of the part remaining unsold in his possession. The

<sup>1</sup> *Yates v. Carnsew*, 3 C. & P. 99; *Hilbery v. Hatton*, 2 H. & C. 822, *acc.* — *Ed.*

jury found a verdict for £717, being the value of the whole; but leave was given to move to reduce it to £347, the value of the part remaining unsold.

*Hullock*, Serjt., now moved accordingly, and insisted that, in order to make a demand and refusal evidence of a conversion, the party, when he refuses, must have it in his power to deliver up or to detain the article demanded; and he cited *Smith v. Young*, where, when a deed was demanded of a defendant, he refused to deliver it up because it was in the hands of his attorney, who had a lien upon it; and Lord Ellenborough held that that refusal was no evidence of a conversion, because the party, at the time he refused, had it not in his power to deliver up or detain the deed in question. Wherefore he contended that the defendant, in this case, was not liable beyond the value of the goods in his possession.

GIBBS, C. J. I agree to the proposition that the demand and refusal in the case cited did not amount to a conversion. But it sometimes happens that two points might be made in a case, and only one is made; and I cannot take the decision on that point as an authority to decide the other. In the present case, the defendant has been proved to have actually sold the goods in dispute, and a sale alone has been held, in many cases, to amount to a conversion. The principle of law is against the defendant, who has applied the goods to his own use. In the case of *Horwood v. Smith*,<sup>1</sup> an action of trover was brought by the owner of goods against the defendant, who had sold them, and it appeared that the goods had been stolen, and sold in market overt to the defendant; and afterwards, and before the conviction, notice was given to the defendant by the plaintiff that the goods were his property, and, nevertheless, the defendant sold them. After conviction the action was brought; and it was held that the plaintiff could not recover, because the sale in market overt protected the goods until conviction, and therefore the defendant was not liable for a sale during the protection; but, unquestionably, if the defendant there had sold after protection had ceased, the action would have lain. Therefore, I think there is no ground for the present motion.

DALLAS, J., BURROUGH, J., and PARK, J., concurred.

*Rule refused.*

After the decision of the case, *Hullock*, Serjt., admitted that the case of *Jackson v. Anderson*<sup>2</sup> was also very strong against the defendant. *M'Combie v. Davies* was also mentioned.<sup>3</sup>

<sup>1</sup> 2 Term Rep. 750.

<sup>2</sup> 4 Taunton, 24.

<sup>3</sup> *Vandrink v. Archer*, 1 Leon. 221; *Bloxam v. Hubbard*, 5 East, 407; *Kyle v. Gray*, 11 Ala. 233; *Tomkins v. Haile*, 3 Wend. 406; *Morrill v. Moulton*, 40 Vt. 242; *Newsum v. Newsum*, 1 Leigh, 86, acc. — ED.











## WATKINS v. WOOLLEY.

AT NISI PRIUS, CORAM RICHARDSON, J., JANUARY 29, 1819.

[*Reported in Gow, 69.*]

TROVER for a landau. It appeared that, some time after the act of bankruptcy was committed, the bankrupt sold to the defendant the landau in question, for the sum of £25, and which sale the plaintiff by this action sought to rescind. Before the commencement of the action, a written demand of the landau, addressed to the defendant, was left at the defendant's house, but it did not appear that he had expressly refused to deliver it up.

*Vaughan*, Serjt., for the defendant, contended that there was not sufficient evidence of a conversion. The landau came lawfully into his possession; and, therefore, not only a demand of it, but a refusal on his part to comply with that demand, must be proved. Mere non-compliance with a demand cannot be such a tortious act as to establish a conversion.

RICHARDSON, J., ruled that the demand of the landau, and the non-delivery of it in pursuance of that demand, was evidence of a conversion.

*The plaintiff had a verdict.*

## DEVEREUX v. BARCLAY.

IN THE KING'S BENCH, JUNE 16, 1819.

[*Reported in 2 Barnewall & Alderson, 702.*]

TROVER for oil. Plea: Not guilty. At the trial at the adjourned sittings before last Hilary term at Guildhall, before Abbott, C. J., the plaintiffs proved a purchase of four tuns of sperm oil, then lying at the defendants' warehouses, from a person of the name of Collinson. The following delivery order was given, dated 13th February, 1818:—

“To MESSRS. A. & W. BARCLAY, Leicester Square.— Please to deliver to the order of Messrs. Devereux and Lambert, the undermentioned goods (enumerating them). Charges from 27th February to be paid by Messrs. Devereux & Co.

EDWARD COLLINSON.”

Soon after this transaction, Collinson, who had in the mean time purchased from Mr. Gamon, a broker, without the defendants' knowledge some dark sperm oil of inferior value, then also lying at the defendants' warehouse, sold this latter quantity, about three tuns, to a third person, and gave the following delivery order, dated 3d March,

1818:—"To Messrs. A. & H. Barclay. Please to deliver to Mr. Dale's carts my dark sperm oil." The defendants, not being aware that the two parcels of oil both belonged to Collinson, by mistake delivered the first parcel of oil to the second delivery order, the first delivery order not having been at that time presented to them by the plaintiffs. The plaintiffs, on the 28th March, presented their delivery order and demanded the oil. Abbott, C. J., being of opinion that this misdelivery, by mistake, did not amount to a conversion so as to entitle the plaintiffs to maintain trover, directed a nonsuit. A rule *nisi* for a new trial having been obtained,

*Scarlett* and *Manning* now showed cause. The mistake which has occurred is solely imputable to the negligence of the plaintiffs in not sooner sending their delivery order to the defendants. The conversion must be an injurious act. A mere misdelivery by mistake will not do. That was so considered by Buller, J., in *Syeds v. Hay*. The case of a warehouseman and a carrier stand on the same ground. Now for a misdelivery by a carrier trover will not lie, although he may be liable for negligence. *Ross v. Johnson*; *Townsend v. Inglis*.<sup>1</sup> Here, too, the property, even supposing a conversion, was not changed as between Barclay and Devereux at the time of the conversion; for although by the sale it was changed as between Devereux and Collinson, yet, till the defendants were made acquainted with that sale, the goods, as far as they were concerned, remained the property of Collinson.

*Gurney* and *Jones*, contra, were stopped by the court.

ABBOTT, C. J. What effect the production of further evidence may have, the court cannot anticipate at present; it is quite sufficient to say that this cause having been stopped too soon, the plaintiffs are entitled to a new trial. This is not the case of an innocent delivery, for it is one contrary to the knowledge which, in point of law, the defendants ought to have had. There is a great distinction between an omission and an act done. In the case cited from *Burrow* no act was done, and Lord Mansfield expressly said that it was a mere omission. But here there is an act done by the defendants, which, in its consequences, is injurious to the plaintiff. Upon this evidence, therefore, I am now of opinion that trover may be maintained.

BAYLEY, J. The case of *Youl v. Harbottle* shows that a carrier is liable in trover for a misdelivery.

HOLROYD and BEST, JJ., concurred.

*Rule absolute.*<sup>2</sup>

<sup>1</sup> Holt N. P. 278.

<sup>2</sup> *Mills v. Ball*, 2 B. & P. 457; *Lubbock v. Inglis*, 1 Stark. 104; *Stephenson v. Hart*, 4 Bing. 476; *Bullard v. Young*, 3 Stew. 46; *Ala. & T. R. R. Co. v. Kidd*, 35 Ala. 209; *Adams v. Blakenstein*, 2 Cal. 413; *Hanna v. Flint*, 14 Cal. 73; *Ill. C. R. R. Co. v. Parks*, 54 Ill. 294; *Clafin v. B. & L. R. R. Co.*, 7 All. 341; *Smith v. Bell*,











## SUMMERSETT v. JARVIS AND OTHERS.

IN THE COMMON PLEAS, JUNE 29, 1821.

[Reported in 3 Broderip &amp; Bingham, 2.]

TROVER for sundry account-books, and other property. At the trial, before Dallas, C. J., Guildhall sittings after Hilary term last, the defendants, who were assignees under a commission of bankrupt, which had been issued against the plaintiff (a farmer, who kept hounds), proved that he, having purchased for his hounds a number of dead horses, had been accustomed to sell the skins and bones; and, upon one occasion, said he should make a good thing of them. The plaintiff's witnesses said the dead horses were purchased expressly for the dogs, and never with any view of ulterior profit. They also proved that the defendant, Jarvis, in the character of assignee, had insisted on the plaintiff's delivering up his books, and that he thereupon delivered them; but it was not proved that the plaintiff had demanded the books of the defendants previously to the commencement of this action. The jury having found a verdict for the plaintiff, and that he was not a trader when the petitioning creditor's debt accrued,

*Taddy*, Serjt., on a former day, obtained a rule *nisi* to set aside this verdict, and enter a nonsuit instead, or for a new trial, on the ground, first, that the verdict was against evidence; secondly, that the plaintiff, having delivered his books for a legal purpose to the assignees, when called on to do so, had not parted with them on compulsion, so that, until a formal demand was made by the plaintiff, the defendants were guilty of no conversion; and such demand having never been made, the plaintiff could not maintain his action. *Nixon v. Jenkins*.

*Lens*, Serjt., for the plaintiff, contended that the delivery above stated was a delivery on compulsion; that, therefore, a demand on the part of the plaintiff was unnecessary; and that the supposition of the plaintiff's having been a trader was completely disproved, because, if a man bought a thing for his own use, and happened to have more than he wanted, his selling the surplus would not make him a trader.

*Taddy* and *Peake*, Serjts., having been heard in support of the rule, and having referred to *Jarrett v. Leonard*,<sup>1</sup>

9 Mo. 873; *Dufour v. Mephram*, 31 Mo. 577; *Ostrander v. Brown*, 15 Johns. 39; *Powell v. Myers*, 26 Wend. 591; *Willard v. Bridge*, 4 Barb. 361; *Esmay v. Fanning*, 9 Barb. 176; *Guillaume v. H. & A. Packet Co.*, 42 N. Y. 212; *Viner v. N. Y. St. Co.*, 50 N. Y. 28; *Bush v. Romer*, 2 N. Y. Supreme Ct. 597; *Compton v. Shaw*, 3 N. Y. Supreme Ct. 761; *Graves v. Smith*, 14 Wis. 5, acc. Conf. *Crouch v. Gr. N. R. R. Co.*, 11 Ex. 756; *M'Kean v. M'Ivor*, L. R. 6 Ex. 36. — ED.

<sup>1</sup> 2 M. & S. 265.

THE COURT expressed a clear opinion that the facts of this case did not constitute a trading, within the intent of the bankrupt laws; that the defendants having taken the books when they were armed with the authority of assignees, the plaintiff must be deemed to have delivered them up on compulsion; that the defendants were thereby guilty of a conversion; and that, consequently, the plaintiff's action was maintainable, without any formal demand on his part.

*Rule discharged.*<sup>1</sup>

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### ALEXANDER v. SOUTHEY.

IN THE KING'S BENCH, NOVEMBER 14, 1821.

[*Reported in 5 Barnewall & Alderson, 247.*]

TROVER for printing-types and other goods. Plea: General issue. At the trial, at the last Guildhall sittings, before Best, J., it appeared that the defendant, who was the servant of the Albion Insurance Company, had in his custody in a warehouse, of which he kept the key, certain goods belonging to the plaintiff, saved from a fire at the plaintiff's house, and which had been carried to the warehouse by the servants of the company. The only evidence of a conversion was that, when the plaintiff demanded the goods from the defendant, the latter said that he could not deliver them up without an order from the Albion office. The learned judge left it to the jury to say whether this qualification of the defendant's refusal was a reasonable one, telling them that, if so, he was of opinion that there was not sufficient evidence of a conversion. The jury, accordingly, found a verdict for the defendant. And now

*Denman* moved for a new trial, on the ground of a misdirection. Here there was a tortious intermeddling with the plaintiff's goods by the defendant's refusal to deliver them up. This was, therefore, a conversion; and *Perkins v. Smith* and *Stephens v. Elwall* were both instances where servants were held liable for a conversion, although it was done for the benefit of their masters. These authorities are in favor of the plaintiff in this case.

ABBOTT, C. J. I am of opinion that in this case there should be no rule. *Perkins v. Smith* and *Stephens v. Elwall* were both cases of actual conversion by servants, in disposing of goods the property of others, to their master's use; but here the question is whether the refusal of the servant to deliver the goods in question amounts to a con-

<sup>1</sup> See *Grainger v. Hill*, 4 B. N. C. 212, acc.; *Conf. Powell v. Hoyland*, 6 Ex. 67. — Ed.











version of the property. This, therefore, is the case of a conversion arising by construction of law. I think the refusal in this case, not being an absolute refusal, was not sufficient evidence of a conversion, and that the learned judge was right in so considering it, and in directing the jury to find a verdict for the defendant.

BAYLEY, J. If the plaintiff in this case had informed the defendant that he had previously made application to the insurance company, and that they had refused permission for the delivery of the property, or had told the defendant that he expected him to go and get an order authorizing the delivery of the property, and after that the defendant had refused either to deliver the goods or to go and get such order, I think it would have amounted to a conversion on his part; but here the defendant had the goods in his possession as the agent of the insurance company, and he would not have done his duty if he had given them up without an application to his employers. He only gave, as it seems to me, a qualified, reasonable, and justifiable refusal.

HOLROYD, J. I think the verdict in this case was right. In point of law, the goods were only in the custody of the defendant, and in the possession of his employers, the insurance company. If we were to hold this refusal to be a conversion, it would go this length, that if a person were to call at a gentleman's house, and to ask his servant to deliver goods to him, and the servant were to refuse to do so, unless a previous application was made to his master, it would amount to a conversion on the part of the servant. In this case the goods came into the defendant's possession lawfully; and the refusal is only till an order is obtained from the defendant's employers. In *Perkins v. Smith*, the defendant received the goods wrongfully at first, and the conversion was by an actual sale of them. Now, it is clear that the authority of the master would not amount to a defence of that which was altogether a tortious act of the servant. The case of *Mires v. Solebay* is an authority in point. There the servant refused to deliver back some sheep which were on his master's land, and it was held to be no conversion on his part. I am, therefore, of opinion that the rule should be refused.

BEST, J. I thought at the trial that I might properly have nonsuited the plaintiff, but that the safer course was to leave the question to the jury. An unqualified refusal is almost always conclusive evidence of a conversion; but if there be a qualification annexed to it, the question then is, whether it be a reasonable one. Here the jury thought the qualification a reasonable one, and that the refusal did not amount to a conversion of the property, and I think they were right in that conclusion.

*Rule refused.*<sup>1</sup>

<sup>1</sup> *Ingalls v. Bulkley*, 15 Ill. 224; *Mount v. Derick*, 5 Hill, 455; *Blankenship v. Berry*, 28 Tex. 448, acc. See also *Clark v. Chamberlain*, 2 M. & W. 78. — En.







## SAXEBY v. WYNNE.

IN THE KING'S BENCH, HILARY TERM, 1825.

[Reported in 3 Starkie's Law of Evidence (3d edition), 1159.]

A. deposits goods with B., and then sells them to C., and afterwards directs B. to deliver the goods to D.; B. is not guilty of a conversion in delivering them to D.<sup>1</sup>

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## MALLALIEU v. LAUGHER AND ANOTHER.

AT NISI PRIUS, CORAM BEST, C. J., DECEMBER 15, 1828.

[Reported in 3 Carrington &amp; Payne, 551.]

TROVER for two trunks, containing wearing apparel, &c. Plea: Not guilty. The plaintiff, who lived at Manchester, deposited the trunks in question at the warehouse of a Mr. Smith, in Cheapside. The defendant Laughher, who was a merchant in London, and agent to Messrs. Knight & Fossett, of Birmingham, instituted proceedings in the sheriff's court; in consequence of which, on the 31st of March, 1828, the other defendant, who was named Page, and was an officer of the sheriff's court, accompanied by other persons, went to the warehouse of Smith, and delivered to him a paper containing a notice of attachment at the suit of Laughher; and having done this, he laid his hand on the trunks, and said, "I attach these as the property of Knight & Fossett." He afterwards put his seal upon them. On the 7th of April, Mallalieu's attorney gave a notice to the defendant Laughher, requiring him forthwith to withdraw the attachment, and pay the expenses which had been incurred, and threatening an action in the event of a refusal. On the 15th of April, the attorney in the presence of Page opened the trunks, when it appeared that they did not contain any Birmingham goods. He immediately went to the defendant Laughher, and told him what had been done, and whose the goods were. He said he was satisfied with the information, and should act as he was advised. The attachment was withdrawn on the 28th of April.

*Wilde*, Serjt., for the defendant. The plaintiff must be called. The attachment does not take the goods out of the hands of the garnishee; it does not alter the possession; and therefore it is no conver-

<sup>1</sup> See *Cranch v. White*, 1 B. N. C. 420, per Vaughan, J. — Ed

sion. The garnishee is under no obligation to hold any goods but those of the debtor. He may plead that he has no goods of the debtor's in his hands. What the officer said was only a declaration that the particular articles are the goods of the debtor. It is no more than a notice. This is not an action on the case for preventing the taking by the plaintiff; the garnishee might deliver at his discretion. There can be no conversion without the party has possession or control. The plaintiff did not demand the goods of Smith, and there is no evidence that he wanted them.

BEST, C. J. I have great difficulty in saying that trover is maintainable here.

*Taddy*, Serjt., for the plaintiff. It is quite sufficient cause of action in trover, that there has been a seizure in consequence of process from a court of local jurisdiction, as the owner could not take the goods without subjecting himself to the powers of that court. In the case of *M'Combie v. Davies*, there is a *dictum* of Lord Ellenborough, where he refers to a case of *Baldwin v. Cole*, in which it was held that the taking an assignment of property is a conversion, although the assignment was not valid to pass the property. It is the meddling or interfering with the property which constitutes the conversion. This is not an attachment generally of any property of Knight & Fossett's which Smith might have, but of the specific articles. Any meddling is sufficient. Lord Ellenborough says, "Certainly a man is guilty of a conversion who takes my property by assignment from another, who has no authority to dispose of it; for what is that but assisting that other in carrying his wrongful act into effect." The act of seizure in its natural effect produces a detention which is an inconvenience to the owner.

BEST, C. J. I am no great friend to the action of trover, nor to any action which keeps parties so much in the dark as those forms which are founded upon fiction. I cannot find any instance similar to the present, and I am unwilling to extend the operation of such actions. I think my Lord Ellenborough went to the extreme verge of the law in *M'Combie v. Davies*. As far as that I should go myself, and agree with the decision of my Lord Holt. In the case decided by my Lord Ellenborough, the state of the property was changed, because there was a transfer in the dock books, which, it is well known, is as much a transfer for the purposes of trade as an actual removal from one warehouse to another. There was in that case the exercise of dominion over the goods. But, in the present case, the man does not remove the goods, he leaves them still where they were, in the possession of Smith; and I do not think that is enough to support an action of trover. I think it better, in all these cases, that we should











not allow this nonsensical form of losing and finding to be extended any farther than it has at present gone. Where the law has been settled we ought not to unsettle it; but, where it has not, we should take care that this absurd jargon is not carried any farther, particularly when there are forms of action which give the party the advantage of knowing the nature of the case against him. I think it right that the plaintiff should be called; but I will give my brother Taddy leave to move the court to enter a verdict for nominal damages. *Nonsuit.*<sup>1</sup>

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JONES AND OTHERS, ASSIGNEES OF SYKES AND BURY, BANKRUPTS v. FORT.

IN THE KING'S BENCH, JULY 8, 1829.

[Reported in 9 Barnewall & Cresswell, 764.]

THE first count of the declaration charged that the defendant deceitfully obtained possession of five bills of exchange under the pretence of discounting them. The remaining counts were in trover, alleging a conversion after the bankruptcy. Plea: Not guilty. At the trial before Lord Tenterden, C. J., at the London sittings after Trinity term, 1828, it appeared that the action was brought to recover five bills of exchange delivered by the bankrupts to the defendant on the 23d of July, 1825, as the plaintiffs alleged, in contemplation of bankruptcy. One was drawn on James Hunter & Co., due the 23d July, 1826, for £3,000; another on McLachlan & Co., due the 21st October, 1826, for £1,500; and three others, each £500, on Thomas Ferguson, two of which were due 29th November, 1826, the other the 5th November, 1826. Sykes & Bury committed an act of bankruptcy on the 28th November, 1825, and on the 30th a commission issued against them, under which they were duly declared bankrupts, and the plaintiffs were appointed assignees. It appeared that Fort had received the amount of some of the bills when they became due. It was proved, on the part of the plaintiffs, that after the bills became due, on the 23d October, 1827, a person employed by the assignees as accountant to the estate demanded the bills from the defendant on account of the assignees. The defendant referred the accountant to his attorney, but the accountant did not apply to the attorney. And it was thereupon contended, on the part of the defendant, that the demand having been made after the bills became due was not sufficient, and that the an-

<sup>1</sup> *Herron v. Hughes*, 25 Cal. 555; *Rand v. Sargent*, 23 Me. 326; *Fernald v. Chase*, 37 Me. 289; *Bailey v. Adams*, 14 Wend. 201. — ED.

swer of the defendant did not amount to a refusal. The plaintiffs contended that the receipt of the money due on the bills by the defendant was an actual conversion, and, therefore, that it was unnecessary to prove a demand and refusal. Lord Tenterden thought there was no evidence of a demand made before the bills became due, or of any refusal by the defendant to deliver up the bills, and that the receipt of the money as it became due on the bills was not an actual conversion, but said he would reserve liberty to the defendant to move to enter a nonsuit in case a verdict should be found for the plaintiffs. The cause then proceeded; and Lord Tenterden directed the jury to find for the plaintiffs, if, upon the evidence, they thought the bills had been delivered by the bankrupts, in contemplation of bankruptcy, to the defendant with a view of giving him a preference. The jury found for the defendant on the first count, and for the plaintiffs on the counts in trover; and a verdict was ultimately entered for the plaintiffs for £3,500, the defendant undertaking to deliver to the plaintiff such of the bills as remained in his hands unpaid. A rule *nisi* had been obtained for entering a nonsuit, on the ground that there was no evidence of a conversion; and *Nixon v. Jenkins* was cited, where there was a collusive sale of goods by a trader on the eve of bankruptcy; and it was contended that a demand and refusal were necessary only in cases where the possession was originally lawful; that in the case then before the court there was a wrongful possession, inasmuch as the bankrupt had no right to make a fraudulent sale of his effects in order to cheat his creditors; but the court held, that when the sale was made the parties were competent to contract; there was no unlawful taking of the goods, though the transaction was liable to be impeached by the assignees: they might either affirm or disaffirm the contract; and if they thought proper to disaffirm it, they ought to have demanded their goods, — a refusal to deliver which would have been evidence of a conversion.

The *Attorney-General, Platt*, and *J. Evans*, on a former day in this term showed cause. The receiving the money by the defendant was an actual conversion of the bills. It was not necessary, therefore, to prove any demand and refusal. That is only evidence from which a jury may presume a conversion. All the bills became due, and the money was received after the act of bankruptcy; therefore the conversion was after the act of bankruptcy. In *Nixon v. Jenkins* no conversion whatever was proved; and in the absence of such proof it was necessary to show a demand and refusal.

*F. Pollock*, contra. In order to recover in trover the plaintiffs were bound to prove either an actual conversion of the bills by the defendant, or a demand and refusal (which are evidence of a conversion)











during the time the bills remained in his possession. There was no proof of any demand and refusal before the bills became due, and the defendant had received the money. Nor was there any refusal to deliver up the bills in answer to the demand proved, for the defendant only referred to his attorney: that was not a refusal. The receipt of the money, and the delivery of the bills to the person who paid it, was not a wrongful conversion of the bills. The delivery of the bills to the defendant was lawful at the time it was made; his possession was, therefore, lawful. *Non constat* that the assignees would disaffirm the act of the bankrupt; and until they did, the defendant, as the holder of the bills, was not only entitled to obtain and receive payment, but would have been guilty of a breach of duty if he had not done so. The receipt of the money when the bills became due, and the delivery of them to the persons who paid them, was an act done by the defendant, not in the exercise of any right, but in the discharge of a duty. It clearly, therefore, was not a wrongful conversion. *Nixon v. Jenkins* is in point. The assignees, if entitled to the produce of the bills, should have brought money had and received. *Cur. adv. vult.*

LORD TENTERDEN, C. J., now delivered the judgment of the court.

In this case a rule was obtained for entering a nonsuit on the ground that there had not been before the action, and within such time as was necessary, a demand of the bills and a refusal. No demand had been made till after the bills became payable, and the money due on them had been received by the defendant. It was contended, in support of the action, that the receipt of the money by Fort, when the bills became due, was in itself a conversion. But we are of opinion that it was not, because the bills being in the hands of Fort, it was his duty to receive the money when due, to whomsoever it might belong; and it would, according to the finding of the jury, have belonged to the assignees. But in this form of action they cannot recover without proving an actual conversion or a demand (made within proper time) and a refusal, which are evidence of a conversion. The rule for entering a nonsuit must, therefore, be made absolute. *Rule absolute.*<sup>1</sup>

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## HAYWARD AND OTHERS v. SEAWARD AND ANOTHER.

IN THE COMMON PLEAS, APRIL 19, 1832.

[Reported in 1 Moore & Scott, 459.]

THIS was an action of trover to recover the value of a steam-boiler and apparatus detained by the defendants under the following circumstances:—

<sup>1</sup> Conf. *Tennant v. Strachan*, M. & M. 377; *Robson v. Rolls*, 1 M. & Rob. 239.  
—ED.

The plaintiffs were owners of the "Royal George" steam vessel. The defendants were engineers at Limehouse. In the month of October, 1830, the boiler in question being out of repair, the vessel was brought alongside the defendants' wharf, and the boiler unshipped for the purpose of repair. The owners of the "Royal George," however, having determined to substitute a new boiler, no repairs were done. Shortly afterwards the plaintiffs sent a barge to the defendants' wharf for the old boiler, which the latter refused to redeliver unless paid a sum of £55 5s., for landing, cleaning, and reshipping it on board the barge. The plaintiffs tendered £23 2s., and demanded the boiler. The defendants refused to accept the sum tendered, or to restore the boiler. On the 12th November, 1830, the following letter was sent by the plaintiffs' counsel to the defendants:—

"Gentlemen,—On behalf of the owners of the "Royal George" steam vessel, I am instructed to commence an action against you for your illegal detention of the boiler and other things belonging to that vessel. The sum of £23 2s. has been offered to you, and is still ready to be paid you on your reshipping the boiler, &c.; which is more than you can justly claim. This you have refused, and you refuse to deliver up the boiler, &c., unless a demand of £55 5s. is paid. This sum is considered exorbitant. Most of the things are necessary for the vessel, and must be immediately supplied. I request to be favored with the name of your attorney, to whom I shall send process in the event of this matter not being immediately settled."

This letter was on the following day answered by the defendants' attorney as follows:—

"Sir,—I am directed by Messrs. Seaward to inform you that they consider the demand made by them on the owners of the "Royal George" steam vessel fair and reasonable, and such as ought, under all circumstances, to be paid on reshipping the boiler. To avoid any inconvenience to your clients by not having the boiler, Messrs. Seaward & Co. request me to inform you that you may at any time take away the boiler, and any other articles belonging to your clients, and they will resort to an action to recover what is due to them. If after this notice the boiler remains on the premises, they will require rent for the same."

On the same day a writ was issued against the defendants, and on the 15th the plaintiffs' attorney wrote to the defendants' attorney as follows:—

"Your letter of the 13th instant is unsatisfactory; and if a compromise is to take place, it must not be on the terms you mention. My









clients expect that the defendants will pay for the boiler and apparatus so unjustly detained, or that a more equitable offer shall be made."

The cause was tried before Lord Chief Justice Tindal, at the sittings at Guildhall after last Hilary term. Witnesses were called on the part of the plaintiff to prove the foregoing facts, and also to prove that the sum of £23 2s. was more than an adequate compensation for what had been done by the defendants. His Lordship, however, told the jury that the plaintiffs were not entitled to recover after the offer of the defendants, by their letter of the 13th November, to give up the boiler. The jury accordingly returned a verdict for the defendants.

Mr. Serjt. *Jones*, on the part of the plaintiffs, now moved for a rule *nisi* that this verdict might be set aside, and a new trial had, on the ground of misdirection. He submitted that the refusal of the defendants to restore the boiler upon the demand made by the plaintiffs amounted to a conversion, which could not be purged by any subsequent act of the parties; and that the letter subsequently written by the plaintiffs' attorney did not amount to a waiver of the right of action vested in him by the act of conversion.

LORD CHIEF JUSTICE TINDAL. A demand and refusal are evidence only, not conclusive, of the fact of conversion. The question here is, whether the plaintiffs ought to have brought their action after the letter of the defendants' attorney, dated the 13th November. In that letter their attorney says: "To avoid any inconvenience to your clients by not having the boiler, Messrs. Seaward & Co. request me to inform you that you may at any time take away the boiler, and any other articles belonging to your clients; and they will resort to an action to recover what is due to them." After that, it seems to me impossible to say that there has been any conversion. The jury could not have found any other verdict. I therefore think no rule should be granted.

Mr. Justice PARK and Mr. Justice GASELEE concurred.

Mr. Justice ALDERSON. A demand and refusal are only evidence of a conversion. The refusal in this case was cured by the offer subsequently made, but before the issuing of the writ, to restore the boiler.

*Rule refused.*<sup>1</sup>

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### PHILPOTT v. KELLEY.

IN THE KING'S BENCH, APRIL 28, 1835.

[Reported in 3 *Adolphus & Ellis*, 106.]

TROVER for port wine, bottles, casks, &c. Pleas: Not guilty, and the Statute of Limitations. Issues thereon. At the trial before Lord

<sup>1</sup> *Wells v. Kelsey*, 15 Abb. Pr. 53; *Savage v. Perkins*, 11 How. Pr. 17, acc. — ED.

Lyndhurst, C. B., at the spring assizes for Kent, 1834, one Croasdill, son-in-law of the defendant, was called on behalf of the plaintiff, and stated that in 1825 he took charge of a pipe of port wine for the plaintiff, to whom it belonged, and placed it in the defendant's cellar by her leave. Some proof was given that he at that time asked her to take part of it on her own account. It appeared further that, in November, 1826, a commission of bankrupt issued against Croasdill, founded on acts of bankruptcy committed during that year, and an assignment was executed on the 6th of December, 1826. Before Christmas the wine was claimed of the defendant by the assignees, but she refused to deliver it. Messrs. Brooks & Co., solicitors for the plaintiff, wrote the following letter to the defendant, dated the 26th December, 1826:

"Madam, — We are informed by Mr. Philpott that a pipe of port wine, purchased and paid for by him, and in your custody, has been applied for under the pretence that it belongs to the assignees of Croasdill, who has been declared a bankrupt. We, therefore, as solicitors for Mr. Philpott, give you notice not to part with the same to any one but such person as shall be duly authorized to receive the same by Mr. Philpott, or by us as his solicitors."

The defendant did not give up the wine, and in December, 1826, or January, 1827 (more than six years before this action was commenced), she bottled part of it, which she afterwards used, but at what time did not appear. The wine was then becoming deteriorated by remaining in the wood. On the 22d of November, 1827, Messrs. Brooks & Co. wrote to the defendant as follows:—

"Madam, — Mr. Philpott of Canterbury has instructed us to commence the necessary proceedings for the recovery of the pipe of port wine, which for his convenience was placed in your cellar, and was demanded of you so long ago as the 12th of March last; but as Mr. Philpott has no wish to put you to any unnecessary inconvenience or expense, we have to propose to you, that in case you will deliver up the same to him within a week from the present time, he will indemnify you against any claim that might hereafter be set up by any other person to the same; and as the matter cannot be allowed to remain any longer unsettled, we shall commence proceedings against you without further notice, unless the same is delivered within the time above stated."

This application was not attended to. In April, 1833, the plaintiff formally demanded the wine of the defendant, with the consent of the assignees, but it was not given up. The present action was commenced on the 18th of October, 1833. The letters, and the bottling











and consumption of the wine, were proved at the trial by the defendant, who contended that a cause of action had accrued more than six years before the commencement of the suit; for that, in the first place, the bottling of the wine was a conversion; and, secondly, the letters showed a demand and refusal more than six years before October, 1833. The Lord Chief Baron left the case to the jury, reserving leave to the defendant to move to enter a nonsuit, if the court should think that the facts proved entitled her to it; and the plaintiff had a verdict. A rule *nisi* was obtained, in the next term, for entering a nonsuit, against which

*Spankie*, Serjt., and *Channell* now showed cause. There was a clear demand and refusal in April, 1833, but the answer attempted is, first, that there had already been a demand and refusal, and that more than six years before the commencement of the action. But in December, 1826, when Messrs. Brooks & Co. wrote their first letter, the assignees had at least a probable claim to the wine, and the letter then written was not a demand, but only a notice not to part with the property to any person not authorized by the plaintiff. Non-delivery of the wine, upon such a letter, could not be evidence of a conversion. The letter of November, 1827, was within the six years: but it is relied upon as showing a previous demand and refusal. Supposing, however, that the letter did show some previous demand, there is no evidence what its nature was, nor of the circumstances which followed. It does not appear that the wine was ever sent for, and the defendant was not bound to send it. She may never have refused to deliver it; but may have kept it merely in order to make the necessary inquiries. To show a conversion, there must be such a refusal as implies an independent assertion of property in the person refusing; not that qualified denial which merely operates in delay of the claim. Instances of the latter kind are given in 2 Starkie on Evidence, p. 843 (2d ed.). Then, secondly, it is said that there was an actual conversion by the bottling, followed by consumption of the wine. But it does not appear when the wine was drunk; and there is no ground to assume that the bottling was done as an act of ownership. It may have been necessary for the preservation of the wine. And it was an act done without the knowledge of the plaintiff. It is true that the plaintiff's want of knowledge has been held to make no difference in an action of trover, to which the statute was pleaded: *Granger v. George*; <sup>1</sup> but that has been in the absence of fraud. It was admitted by Lord Mansfield, in *Bree v. Holbech*,<sup>2</sup> that there may be cases which fraud will take out of the Statute of Limitations; and the courts, in

<sup>1</sup> 5 B. & C. 149.

<sup>2</sup> 2 Doug. 654.

deciding subsequent cases, have not interfered with that position. [PATTESON, J. Although there may have been fraud in the act done by a defendant, is that sufficient unless there was fraud used to prevent the plaintiff's earlier knowledge of the act? *Howell v. Young*,<sup>1</sup> Coleridge, J. In *Brown v. Howard*,<sup>2</sup> Dallas, C. J., seems to consider that fraud in the act itself would be sufficient.]

*Thesiger* and *Platt*, contra. The letter of November, 1827, and the defendant's omission to answer it, joined to the fact of her having previously bottled off a part of the wine, were evidence of a conversion by her more than six years before action brought. Any claim on the part of the assignees to which she might have paid attention was disposed of by the letter of December, 1826; and then the letter of November, 1827, shows that there had been a previous demand of the wine on the plaintiff's behalf, and that, at the time of that demand, the defendant was refusing to give it up. It is not necessary to a case of conversion that there should be direct proof of a demand and refusal; circumstances may raise a presumption of them. *Topham v. Braddick*,<sup>3</sup> *Watkins v. Woolley*. [PATTESON, J. Are we to presume a refusal in favor of a person who sets up her own wrongful act? The offer of indemnity shows that the refusal, if there had been one, had been qualified by reference to the supposed right of the assignees; and if there were conflicting claims, such a refusal to deliver to either party was not proof of a conversion.<sup>4</sup> Was it to be presumed that, between the letter of 1826, and the letter containing the offer to indemnify, there has been a positive refusal?] The threat of legal proceedings in the last letter implies such a refusal. But, further, the bottling of part of the wine was a conversion. It is said that that was done to preserve it. But if a perishable article is deposited for safe custody, it is not clear that the bailee has a right, for the sake of any supposed benefit to the commodity, to exercise such an act of ownership as this, which even affects the evidence of title. And it is a reasonable question here, whether or not the intent was preservation. The drinking of the wine afterwards is strong evidence that the intention in bottling was to convert it. [LORD DENMAN, C. J. That was for the jury, and they have found otherwise. As to the bottling, it was the treatment to which the wine was entitled, in whosoever hands it was. LITTLEDALE, J. I should not have concluded that the bottling showed an intention to convert, considering the perishable nature of the commodity. PATTESON, J. It is consistent with the evidence, that it may have been done by consent of all the parties claiming.] In *Richard-*

<sup>1</sup> 5 B. & C. 259.<sup>2</sup> 2 B. & B. 75.<sup>3</sup> 1 Taunt. 572.<sup>4</sup> As to the case of an unqualified refusal by a bailee to one of such conflicting parties, see *Wilson v. Anderton*, 1 B. & Ad. 450.











son v. Atkinson it was held that drawing off part of the liquor was a conversion of the whole. [PATTESON, J. There the defendant filled up the vessel with water. It cannot be contended, that if a bailee draws off part of a butt of wine, a perfect cause of action arises in respect of the whole. Such a constructive conversion is monstrous. And at all events the wrong-doer cannot set it up. COLERIDGE, J., referred to *Swayn v. Stephens*.<sup>1</sup>] To hold that a defendant in trover could not set up his own wrongful act under a plea of the Statute of Limitations, would repeal the statute as to this form of action. In *Clendon v. Dinneford*,<sup>2</sup> where the defendant had obtained letters and two books belonging to the plaintiff, and, upon demand, gave up the letters and one book, but kept the other, it was held that the plaintiff might recover for a conversion of the whole. [LITLEDALE, J. There the question arose on a demand and refusal. PATTESON, J. A conversion of part may, as against the wrong-doer, be a conversion of the whole, but it does not follow that he may set it up as such. And in that case it would have been different if the defendant had merely destroyed one of the books.] The question in such cases is, whether a defendant's treatment of part of the property has been such as amounts to a conversion of all. If a bailee has a butt of wine, and offers to deliver all of it to the owner, except five gallons, he may be sued for a conversion of the whole butt.

LORD DENMAN, C. J. I think it was not proved in this case that there had been a conversion more than six years before the action was brought. There was, indeed, some evidence of facts upon which an action might have been commenced earlier; whether a jury would have found for the plaintiff upon that evidence or not, I cannot say, but it would not have been satisfactory to me. It appears that, on the bankruptcy of the person who deposited this wine, there were two parties who claimed it. The first evidence which the defendant gives of her own wrongful conversion is a letter of the 22d of November, 1827, speaking of a refusal given by her to a demand made in the preceding March. If that demand was by letter, the letter may be supposed to have been in the defendant's possession; but she did not produce it. And there was no evidence when the refusal, if there was one, was sent; it may have been the very day before the letter of the 22d of November was written. In the early part of the proceedings it is evident that the defendant considered herself as balancing between two claims adverse to each other. The circumstance of the wine having been bottled was one upon which the jury were to put their own construction; they have done so, and I think rightly. The question was merely one of fact.

<sup>1</sup> Cro. Car. 245, 333.

<sup>2</sup> 5 Car. & P. 13.

LITLEDALE, J. I think there was no evidence of a conversion at the distance of time alleged by the defendant. When the first demand is supposed to have been made, she appears to have been ignorant who was the party entitled; and it is not shown that she gave any refusal as against the plaintiff. As to the bottling, there is no evidence who directed that to be done; but it appears that the wine was deteriorated by being kept in the wood; and the most obvious inference from the facts would be, that the plaintiff, for whom it was deposited, himself desired that it should be bottled. This, however, being done, some of the wine was afterwards consumed; but at what time that happened does not appear; and the fact, I think, is not available to show that the bottling was in itself an act of ownership amounting to a conversion. It was not such an act, if done by the direction of the party depositing, or if done for the best, with a view to preservation. The demand in November, 1827, refers to a previous one in March in the same year; but at that time two parties were alleging a title to the wine; if there was a refusal then, it does not show that the defendant herself claimed to keep it. All that passed at that time may have been, that she may have said, "I will take care that the wine does not go out of my cellar," without, however, giving any absolute refusal to either party. But, in fact, we are in the dark as to this part of the case. I think the rule ought to be discharged.

PATTESON, J. The plaintiff makes a *prima facie* case by the demand in 1833; but the Statute of Limitations being pleaded, the defendant has to prove a conversion more than six years before the commencement of his action. A case of *Swayn v. Stephens*<sup>1</sup> was cited by my brother Coleridge, in which, although the defendant had actually sold the ship for which the action was brought, more than six years before, the court presumed in favor of the plaintiff (who had been unable to sue the defendant by reason of his remaining abroad), that the ship had come to the defendant's hands a second time, and been converted anew. That decision was against the opinion of one of the judges, and savors of subtlety; if such a question arose now, I should doubt if it would be decided in the same manner. The attempt here is to establish a conversion in two ways. First, by a demand and refusal; but in that, I think, the plaintiff fails. It is said that, from the construction to be put upon the letter of November, 1827, a previous refusal is to be inferred. That was for the jury; and if the point was not distinctly put to them, and we are to place ourselves in the situation of a jury, I should say that a different construction was the more reasonable one. The assignees at first claimed the

<sup>1</sup> Cro. Car. 245, 333.











wine. The defendant was ordered by the plaintiff not to deliver it to them. The fair presumption, then, is, that she retained it only till the rights of parties should be established. What the demand was, which is said to have been made in March, or how it was answered, is not shown by the evidence. The threat in the letter of November, 1827, that proceedings will be taken against the defendant, may prove that the attorney thought there had been a demand and refusal; but the offer of an indemnity shows that the assignees were supposed still to keep up a claim, and supports the inference that the defendant was at that time holding the property only till the rights of the claimants should be ascertained. I do not say, under these circumstances, that there may not have been a demand and refusal before the commencement of the six years; but it was not proved, and the proof of it lay on the defendant.

Then, secondly, it is contended that the bottling of the wine was a conversion; and I do not say that it would not have been so, if the defendant had clearly done it on her own account, and adversely to the proprietor. But it appears to have taken place just when the assignees and the plaintiff were demanding the wine; and it is much more like an act done to preserve it until the right could be ascertained, than an exercise of ownership. It is urged, however, that the wine was afterwards consumed by the defendant. But, in the first place, there is no proof when that happened, and we are not to make a presumption in favor of a party setting up his own wrong. And, secondly, even if a part of the wine was drunk more than six years before the commencement of the action, I think that the mere taking away or destroying a part of property which remains in the hands of a bailee is not such a conversion that the owner may sue in trover for the whole. In *Richardson v. Atkinson*, where part of the liquor was drawn off, it was held to be a conversion, but the defendant had filled the vessel up with water. I am not prepared to say that, if a person draws off part of the contents of a cask, and is ready to deliver the rest, his taking away such part is necessarily a conversion of the whole. No case has gone that length yet. If it were so held, a person with whom a cask of liquor was deposited, and who wished to convert all of it, might draw off a part of the contents, and, if the vessel remained with him for six years afterwards, refuse to deliver up the rest, and set up his conversion of a part so many years ago in answer to an action of trover. In *Clendon v. Dinneford*,<sup>1</sup> which has been cited, the defendant had the books and letters, which were the subject of the action, in his possession when they were demanded on behalf of the plaintiff; and

<sup>1</sup> 5 Car. & P. 13.

he refused them to the party making the demand, but offered to give them up to another person connected with the plaintiff. That person afterwards applied, but could only obtain the letters and one of the books, which the plaintiff, for the sake of the letters, consented to take. This was not a destruction of part, but a delivery of part only, after a promise to deliver the whole. And if a person, having in his possession several things belonging to another, all of which it is in his power to deliver up, refuses to let the owner have more than a part of them, that may be a conversion; but the present is a different case.

COLERIDGE, J. The statement of the question almost disposes of this case. The burden of proof, upon the plea of the statute, lay on the defendant; and the question is, not whether, upon the acts done, a jury, or this court putting itself in the place of a jury, would have been warranted in finding a conversion, but whether the facts are so clear that the judge should have put it to them almost as a conclusion of law, that a conversion was proved; or so clear, at all events, that they ought to have found a conversion. As to the acts themselves, the bottling, particularly when coupled with the consumption of the wine afterwards, might, if it had been ascertained when and by whose direction the bottling took place, have been evidence of a conversion of the whole. But this must depend upon the circumstances, and some of those, we know, lead to a contrary conclusion; as, for instance, the state of the wine while remaining in the wood. The drinking may have been intended when the wine was bottled, or may have been thought of afterwards; that was for the jury. As to the legal effect of the consumption of part of the wine, I agree with my brother Patteson; I should be sorry if it could ever be held that taking a part of the property under such circumstances amounted to a conversion of the whole; that the fraud so committed, and the ignorance of the party against whom it was practised, could protect the wrongdoer from an action; and that a person who had been for a long time the bailee of a quantity of wine, and who had drunk six dozen, or one dozen, of it six years ago, might set that up as a defence against the claim of the owner. I say this as to the law, but it lay on the defendant to make it clear in fact, which it is not, that the wine had been drunk six years before the action was brought. With respect to the alleged demand and refusal, that would only be evidence of a conversion; and as to the fact of demand and refusal, we do not know enough from the case before us to say that the conclusion insisted upon for the defendant is the only proper one. There is no ground, therefore, to disturb the verdict.

*Rule discharged.*









CANOT, ASSIGNEE OF HUGHES, AN INSOLVENT, v. HUGHES,  
WIDOW, ADMINISTRATRIX.

IN THE COMMON PLEAS, JANUARY 14, 1836.

[Reported in 2 Bingham's New Cases, 448.]

TROVER. The plaintiff, as assignee of Hughes, an insolvent, sued his administratrix for the conversion of certain wine warrants in the possession of the insolvent at the time of his death. The only evidence of conversion was an application for the warrants, made on the part of the plaintiff, to the administratrix, when she said they were in the hands of her attorney. Upon which the plaintiff was nonsuited, on the ground that this did not amount to a conversion, or a refusal to deliver.

*Bompas*, Serjt., moved to set aside the nonsuit, on the ground that, as the defendant must have known of her husband's insolvency, and that, therefore, the warrants belonged to his assignees, the delivering them to the attorney instead of the assignees was an actual conversion.

*Sed per Curiam*. There is no evidence that it was communicated to the defendant who was the owner of the warrants; the placing them in the hands of her attorney was no more than placing them in a strong box for the purpose of safety. *Rule refused.*

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.. DAVIES v. NICHOLAS.

AT NISI PRIUS, CORAM COLERIDGE, J., MARCH 11, 1836. .

[Reported in 7 Carrington & Payne, 339.]

TROVER for chairs. Pleas: first, not guilty; second, a denial of the plaintiff's property in the chairs.

It appeared that the chairs belonged to the plaintiff, and that they were lent by him to a person who had died, and that the defendant had come into the possession of the deceased's furniture. It further appeared that, when the chairs were demanded of the defendant, he said that he should do nothing but what the law required, and that he had not since delivered up the chairs.

*John Evans*, for the defendant, submitted that this was not a conversion.

COLERIDGE, J. I think it is quite sufficient evidence of a conversion  
*Verdict for the plaintiff.*

## WILLIAMS v. GESSE.

IN THE COMMON PLEAS, JUNE 6, 1837.

[Reported in 3 Bingham's New Cases, 849.]

TROVER for a coat and pantaloons. Plea: Not guilty.

The defendant kept a public-house at Oxford, frequented by farmers. The plaintiff's clothes, packed up in a box, were deposited in the defendant's kitchen, behind the settle, by a person who said the box was to stay till called for. The box was never seen again by the plaintiff, but when he inquired for it, the defendant said, "I suppose it's behind the settle."

Verdict for the plaintiff, with leave for the defendant to move to enter a nonsuit instead, on the ground that there was no evidence of any conversion.

*Ludlow*, Serjt., having obtained a rule *nisi* accordingly,

*V. Lee* appeared for the plaintiff; but, upon reading the learned judge's report as above,

The rule was made

*Absolute.*

In a similar action by a sister of the plaintiff against the same defendant, it was proved that the defendant received parcels for carriers; that the parcels were accustomed to be placed behind the settle; and that when application was made for the parcel in question, the defendant's wife said, "My husband has sent it, no doubt, by Croft, the carrier; he has a bad memory; it's a pity you did not speak to me."

*Verdict for the defendant.*

*V. Lee*, in Easter term, moved for a new trial, on the ground that the language of the wife showed that the defendant had interfered by giving directions which would amount to a conversion.

*Sed per Curiam.* What was there to go to the jury? Was there any thing but negligence? That will not support the action.

*Rule refused.*

## VAUGHAN v. WATT.

IN THE EXCHEQUER, EASTER TERM, 1840.

[Reported in 6 Meeson &amp; Welsby, 492.]

TROVER for different articles of wearing apparel, &c. Pleas: first, not guilty; secondly, that the goods were not the property of the plaintiff; on which issues were joined. At the trial before Rolfe, B., at the Middlesex sittings in Hilary term, the following appeared to be the facts of the case: On the 24th July, 1839, the goods in ques-











tion were pledged with the defendant, a pawnbroker, by a female of the name of Hubbard, in the name (as the defendant understood it) of Mary Warne, and the duplicate was so made out. On the next day he was sent to by that person (whom he did not then know, but who afterwards proved to be the plaintiff's wife), to say that she had lost the duplicate, and she demanded and obtained from him a copy thereof, and also a form of a declaration of the loss of it, pursuant to the Stat. 39 & 40 Geo. III. c. 99, § 16, and 5 & 6 Will. IV. c. 62, § 12. Some days afterwards, upon an allegation that this document also was lost, she obtained from the defendant another similar form. On the 6th of August, the plaintiff Vaughan produced the duplicate to the defendant, and demanded the goods, tendering the amount of the pledge and the interest. The defendant refused to give them up, on the ground of the declarations having been obtained from him. On the 7th, the plaintiff made an application to the police magistrate at Hatton Garden, for the purpose of compelling the restoration of the goods, and a summons was granted for the defendant's appearance on the following day, when he attended accordingly, but was compelled to go away before the case was called on. On the 9th, however, the parties again attended before the magistrate; and the plaintiff then stated that it was his wife by whom the goods had been pledged. The magistrate, however, after hearing the circumstances, declined to interfere. The plaintiff then brought this action, the writ being sued out on the 21st August. It was contended for the defendant that there was no evidence of such an absolute refusal by him to deliver up the goods to the plaintiff, as constituted a conversion; and that he was justified in refusing to do so, by the circumstance of the declarations having been obtained by another party claiming to be the owner. The learned judge thought that the mere fact of these documents having been obtained was no defence as against the real owner of the goods, who might in that case never have it in his power to recover possession of them; and, under his Lordship's direction, a verdict was found for the plaintiff, damages £10, leave being reserved to the defendant to move to enter a nonsuit. The jury were discharged as to the second issue.

*G. T. White* having accordingly obtained a rule for a nonsuit, or for a new trial (citing *Isaac v. Clark*<sup>1</sup> and *Green v. Dunn*),

*Pike* now showed cause. It is admitted that the plaintiff is the real owner of the goods. The 15th section of the 39 & 40 Geo. III. c. 99, declares that the person producing the original note or memorandum of the goods pledged, as the owner thereof, to the pawnbroker, shall be deemed and taken to be, as against him, the real owner of the

<sup>1</sup> 2 Bulst. 312.

goods, and the pawnbroker is thereby required, on satisfaction of the principal sum advanced and the profit, to deliver them to such person. The plaintiff complied in all respects with the directions of this section. And the 16th section of the same act, upon which reliance is placed for the defendant, does not entitle the pawnbroker to retain the goods against the real owner, unless where the party obtaining the form of affidavit therein mentioned, shall have proved his right to them to the satisfaction of a justice. Even assuming, therefore, that the defendant was ignorant that the party who pledged the goods was the wife of the plaintiff, he is not entitled to withhold them.

*White and Cockburn*, contra. There was no such refusal to deliver up the goods proved in this case, as amounted to a conversion. [PARKE, B. All that the pawnbroker can be entitled to do is, to keep the goods for a reasonable time, until the party shall have gone before a magistrate to verify the declaration. You did not ask the learned judge to leave it to the jury whether such reasonable time had elapsed. This declaration in London ought to be acted on immediately. If the question had been left to the jury, there was abundant evidence for them to find that more than a reasonable time had elapsed.] If a party, at the time when he refuses to deliver goods on demand, has a reasonable doubt whose property they are, even if he obtain a knowledge of the fact the next day, that refusal cannot be treated as a conversion, without a subsequent demand. *Green v. Dunn*; *Alexander v. Southey*. If the defendant was justified in the refusal at that moment, it is a sufficient defence. The learned judge ought therefore to have left it to the jury, as was done in the latter case, whether the qualification of the defendant's refusal was a reasonable one. In *Green v. Dunn*, the plaintiff was clearly the real owner of the goods; yet because the defendant's refusal to deliver them was a qualified one, it was held that there was no conversion. This was a refusal, not absolute, but qualified, and *bona fide*, not with the view of withholding the property from the real owner, but for the purpose of protecting it for the real owner, whoever he might be. It is the duty of the pawnbroker to take precautions that by the loss of the duplicate the loss of the goods does not result to the owner. Suppose this were a case of a simple bailment at common law, independently of the statute, — a deposit of goods, with a written engagement to redeliver them on demand; and they were surreptitiously obtained from the bailee by another party, and notice thereof given to the bailor, a refusal to redeliver them on that ground clearly would not be a conversion, according to the cases already cited; and this is in effect the same case. Whether the defendant had the *bona fide* intention of retaining the goods for the real owner was at all events a question for the jury, and ought to have been left to them.











LORD ABINGER, C. B. It is with great regret that I bring myself to concur in making this rule absolute for a new trial. The verdict is only for £10, and the event must necessarily be the same on a new trial, the same facts being proved. If the question had been brought before the jury, whether a reasonable time had elapsed for the defendant to ascertain the title to the goods, nobody can doubt that they would have come to the same conclusion. It must be admitted, however, that this being a question for the jury, ought to be left to them. The mere detention of the goods, abstractedly, was not a conversion, if the delay was only for a reasonable time : here, I think, the time was unreasonable.

PARKE, B. The learned judge was incorrect in telling the jury that the mere refusal to deliver the goods to the real owner was a conversion. It was a question for the jury, whether the defendant meant to apply them to his own use, or assert the title of a third party to them, or whether he only meant to keep them in order to ascertain the title to them, and clear up the doubts he then entertained on the subject, and whether a reasonable time for doing so had not elapsed, without which it would not be a conversion. It ought therefore to have been left to the jury, whether the defendant had a *bona fide* doubt as to the title to the goods, and if so, whether a reasonable time for clearing up that doubt had elapsed. The party obtaining the declaration is bound to go before a magistrate, and satisfy him by evidence that he is the real owner of the goods ; and if a reasonable time had elapsed in this case for doing so, the defendant had no longer any reasonable ground for detaining them on the 6th of July, for a supposed defect of title. That was a question for the jury. The statute supposes that the party will go before the magistrate immediately ; and if three or four days elapse without his doing so, the jury would be well warranted in finding that the reasonable time had elapsed. But it is all for the jury ; however strong the facts, the judge cannot take it upon himself to refuse to leave the question to them. Therefore, although the result will clearly be the same, in strict law the defendant is entitled to have the facts submitted to the jury. There must therefore be a new trial.

ROLFE, B. I concur in the decision of the court, and very much also in the regret that there should be a new trial, where the matter in question is so small, and the result must be the same. According to the act of Parliament, the party obtaining the form of declaration "shall thereupon prove his property in or right to the goods, to the satisfaction of some justice of the peace," and then the document, authenticated by the signature of the justice, is to be an indemnity to the pawnbroker. Here the goods were pawned on the 24th of July ; on the 6th of August they were demanded by the plaintiff ; at some

undefined time between those dates the application was made for the form of declaration, but no proceedings were taken thereupon; and there was what was equivalent to a repetition of the refusal to deliver the goods, on the 7th, 8th, and 9th of August. I certainly did not leave it to the jury to say whether a reasonable time had elapsed,—nor for him to inquire into the title, but for the party to do that which he was bound to do thereupon, on obtaining the declaration; because it appeared preposterous to leave to the jury the question, whether a reasonable time had elapsed for doing that which ought to be done immediately, when a period had elapsed which was indeed undefined, but might be any time from ten to fifteen days. However, the matter was strictly for the jury, and I agree, as it was not left to them, that there must be a new trial. *Rule absolute for a new trial.*<sup>1</sup>

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FOULDES v. WILLOUGHBY.

IN THE EXCHEQUER, JUNE 1, 1841.

[Reported in 8 Meeson & Welsby, 540.]

TROVER for divers, to wit, two horses. Plea: Not guilty. The cause was tried before Maule, J., at the last spring assizes for Liverpool, when it appeared that the defendant was the occupier or manager of a ferry by means of steamboats over the river Mersey, from Birkenhead to Liverpool, and that on the 15th of October, 1840, the plaintiff had embarked on board the defendant's ferry-boat at Birkenhead, having with him two horses, for the carriage of which he had paid the usual fare. It was alleged that the plaintiff misconducted himself and behaved improperly after he came on board the steamboat, and when the defendant came on board he told the plaintiff that he would not carry the horses over, and that he must take them on shore. The plaintiff refused to do so, and the defendant took the horses from the plaintiff, who was holding one of them by the bridle, and put them on shore on the landing-slip. They were driven to the top of the slip, which was separated by gates from the high road, and turned loose on the road. They were shortly afterwards seen in the stables of a hotel at Birkenhead, kept by the defendant's brother. The plaintiff remained on board the steamboat, and was conveyed over

<sup>1</sup> Watt v. Potter, 2 Mason, 77; Zachary v. Pace, 9 Ark. 212; Witherspoon v. Blewett, 47 Miss. 570; Robinson v. Burleigh, 5 N. H. 225; Fletcher v. Fletcher, 7 N. H. 452; Cushing v. Breck, 10 N. H. 116; Thomson v. Sixpenny Sav. Bank, 5 Bosw. 293; Rogers v. Weir, 34 N. Y. 463; McEntee v. N. J. St. Co., 45 N. Y. 34; Ball v. Liney, 48 N. Y. 6; Carroll v. Mix, 51 Barb. 212, acc.—ED.











the river to Liverpool. On the following day the plaintiff sent to the hotel for the horses, but the parties in whose possession they were refused to deliver them up. A message, however, was afterwards sent to him by the hotel-keeper, to the effect that he might have the horses on sending for them and paying for their keep; and that if he did not send for them and pay for their keep, they would be sold to pay the expense of it. The plaintiff then brought the present action. The horses were subsequently sold by auction. The defence set up at the trial was, that the plaintiff had misconducted himself and behaved improperly on board, and that the horses were sent on shore in order to get rid of the plaintiff, by inducing him to follow them. The learned judge told the jury, that the defendant, by taking the horses from the plaintiff and turning them out of the vessel, had been guilty of a conversion, unless they thought the plaintiff's conduct had justified his removal from the steamboat, and he had refused to go without his horses; and that if they thought the conversion was proved, they might give the plaintiff damages for the full value of the horses. The jury found a verdict for the plaintiff with £40 damages, the value of the horses.

In Easter term last, a rule was obtained calling upon the plaintiff to show cause why the verdict should not be set aside on the ground of misdirection, both as to the proof of a conversion, and also as to the amount of the damages: against which rule

*W. H. Watson* and *Atherton* now showed cause. The evidence showed that which clearly amounted to a conversion, and it was not affected by the circumstance that the plaintiff had the means afterwards, if he had chosen, of obtaining the horses again. A wrongful removal of a chattel, even for a few yards, amounts in law to a conversion. [LORD ABINGER, C. B. According to that argument every trespass is a conversion.] If a man takes and rides another person's horse without his consent, however short a distance, it is in law a conversion. [ALDERSON, B. In that case there is a user of the horse. LORD ABINGER, C. B. In this case the horses were turned out of the boat by the defendant because the owner refused to take them out, and not with any view to appropriate them to his own use, but to get rid of their owner. ALDERSON, B. If a man were to remove my carriage a few yards, and then leave it, would he be guilty of a conversion?] In the notes to *Wilbraham v. Snow*,<sup>1</sup> it is said, "Whenever trespass for taking goods will lie, that is, where they are taken wrongfully, trover will also lie, for one may qualify but not increase a tort;" citing *Bishop v. Montague*.<sup>2</sup> [LORD ABINGER, C. B. I cannot agree to that position, at least to the extent for which it is now used.<sup>3</sup>] In *Bac*,

<sup>1</sup> 2 Saund. 470.

<sup>2</sup> Cro. Eliz. 824.

<sup>3</sup> In the case cited, the beasts were taken absolutely by the defendant's bailiff as

Abr. Trover, A, it is said, "If the goods of J. S. have been taken by J. N. in such a tortious manner that an action of trespass would lie, an action of trover will likewise lie." So in Rolle's Abr. 4, *Action sur Case*, L: "If a man take my horse and ride him, and then redeliver him to me, still I may have an action against him, for it is a conversion, and the redelivery is no bar to the action, and only goes in mitigation of damages;" citing the Countess of Rutland's Case. The mere exercise of dominion over a thing is, in law, a conversion of it. What is said by Buller, J., in *Syeds v. Hay*, is applicable to the present case: "If a person take my horse to ride, and leave him at an inn, that is a conversion; for though I may have the horse on sending for him, and paying for the keeping of him, yet it brings a charge on me." In *Mulgrave v. Ogden*, which was an action of trover for twenty barrels of butter, with counts that the defendant *tam negligenter custodivit*, that they became of little value, it was held upon demurrer, by all the justices, "that no action on the case lieth in this case, for no law compelleth him that finds a thing to keep it safely; as if a man finds a garment and suffers it to be moth-eaten; or if one finds a horse and giveth it no sustenance; but if a man finds a thing and useth it, he is answerable, for it is a conversion: so if he of purpose misuseth it, as if one finds paper and puts it into the water, &c.; but for negligent keeping no law punisheth him." And in Buller's *Nisi Prius*, 44, it is said: "To determine what evidence will be sufficient to prove a conversion in the defendant, it must be known how the goods came to his hands; for if they came to his hands by delivery, finding, or bailment, an actual demand and refusal ought to be proved; but it is not necessary to prove an actual demand if an actual taking be proved, for the taking, being unlawful, is itself a conversion." They also referred to the cases collected in *Roscoe on Ev.* (5th ed.) 526.

As to the amount of damages, that was a question for the jury, and if they were satisfied that the defendant was guilty of the conversion, they were fully warranted in giving the full value of the horses, which were, in fact, wholly lost to the plaintiff.

*Crompton*, in support of the rule. The jury were not warranted in awarding the full value of the horses, because the loss to the plaintiff was the consequence of his own act in not following them, and not the consequence of the defendant's act. He cited *Moon v. Raphael*.<sup>1</sup>

As to the other point, the case of *Bushel v. Miller* is in point. There it was stated that particular porters had a right to put small parcels of

for a heriot due, the defendant afterwards agreeing to the taking and converting them. The court differed in opinion whether trover was maintainable, or whether the action should not have been trespass.

<sup>1</sup> 2 Bing. N. C. 310.





goods in a hut on the Custom-house Quay, each porter having a box or cupboard within the hut for that purpose. The plaintiff, being one of the porters, put in goods belonging to A., and laid them so that the defendant, who was another of the porters, could not get to his chest without removing them. He accordingly did remove them about a yard from the place where they lay towards the door, and, without returning them into their place, went away, and the goods were lost. The plaintiff having satisfied A. for the value of the goods, brought trover against the defendant; and it was held by Pratt, C. J., "that there was no conversion in the defendant; the plaintiff, by laying his goods where they obstructed the defendant from going to his chest, was a wrong-doer, and the defendant had a right to remove the goods; that, as to the not returning the goods to the place where he found them, if this were an action of trespass, perhaps it might be a doubt; but he was clear it could not amount to a conversion." It is not every wrongful interference with the chattel of another that will constitute a conversion. There must be an intention to deprive the owner of his general right of dominion over it. Here there was no such intention; the object merely was, to get rid of the owner as well as the horses. He referred to *Cooper v. Chitty*<sup>1</sup> and *Garland v. Carlisle*.<sup>2</sup>

LORD ABINGER, C. B. This is a motion to set aside the verdict on the ground of an alleged misdirection; and I cannot help thinking that if the learned judge who tried the cause had referred to the long and frequent distinctions which have been taken between such a simple asportation as will support an action of trespass, and those circumstances which are requisite to establish a conversion, he would not have so directed the jury. It is a proposition familiar to all lawyers, that a simple asportation of a chattel, without any intention of making any further use of it, although it may be a sufficient foundation for an action of trespass, is not sufficient to establish a conversion. I had thought that the matter had been fully discussed, and this distinction established, by the numerous cases which have occurred on this subject; but, according to the argument put forward by the plaintiff's counsel to-day, a bare *asportavit* is a sufficient foundation to support an action of trover. I entirely dissent from this argument; and therefore I think that the learned judge was wrong in telling the jury that the simple fact of putting these horses on shore by the defendant amounted to a conversion of them to his own use. In my opinion, he should have added to his direction, that it was for them to consider what was the intention of the defendant in so doing. If the object, and whether rightly or wrongfully entertained is immaterial, simply was to induce

<sup>1</sup> 1 W. Bla. 65.

<sup>2</sup> 2 C. & M. 31.

the plaintiff to go on shore himself, and the defendant, in furtherance of that object, did the act in question, it was not exercising over the horses any right inconsistent with, or adverse to, the rights which the plaintiff had in them. Suppose, instead of the horses, the defendant had put the plaintiff himself on shore, and on being put on shore the plaintiff had refused to take his horses with him, and the defendant had said he would take them to the other side of the water, and had done so, would that be a conversion? That would be a much more colorable case of a conversion than the present, because, by separating the man from his property, it might, with some appearance of fairness, be said the party was carrying away the horses without any justifiable reason for so doing. Then, having conveyed them across the water, and finding neither the owner or any one else to receive them, what is he to do with them? Suppose, under those circumstances, the defendant lands them, and leaves them on shore, would that amount to a conversion? The argument of the plaintiff's counsel in this case must go the length of saying that it would. Then, suppose the reply to be that those circumstances would amount to a conversion, I ask, at what period of time did the conversion take place? Suppose the plaintiff had immediately followed his horses when they were put on shore, and resumed possession of them, would there be a conversion of them in that case? I apprehend, clearly not. It has been argued that the mere touching and taking them by the bridle would constitute a conversion, but surely that cannot be: if the plaintiff had immediately gone on shore and taken possession of them, there could be no conversion. Then the question, whether this were a conversion or not, cannot depend on the subsequent conduct of the plaintiff in following the horses on shore. Would any man say, that if the facts of this case were, that the plaintiff and defendant had had a controversy as to whether the horses should remain in the boat, and the defendant had said, "If you will not put them on shore, I will do it for you," and, in pursuance of that threat, he had taken hold of one of the horses to go ashore with it, an action of trover could be sustained against him? There might, perhaps, in such a case, be ground for maintaining an action of trespass, because the defendant may have had no right to meddle with the horses at all; but it is clear that he did not do so for the purpose of taking them away from the plaintiff, or of exercising any right over them, either for himself or for any other person. The case which has been cited from *Strange's Reports*, of *Bushel v. Miller*, seems fully in point. There the plaintiff and defendant, who were porters, had each a stand on the Custom-house Quay. The plaintiff placed goods belonging to a third party in such a manner that the defendant could not get to his chest without removing them, which he











accordingly did, and forgot to replace them, and the goods were subsequently lost. Now suppose trespass to have been brought for that asportation, the defendant, in order to justify the trespass, would plead that he removed the parcels, as he lawfully might, for the purpose of coming at his own goods; and the court there said that whatever ground there might be for an action of trespass in not putting the package back in its original place, there was none for trover, inasmuch as the object of the party in removing it was one wholly collateral to any use of the property, and not at all to disturb the plaintiff's rights in or dominion over it. Again, suppose a man puts goods on board of a boat, which the master thinks are too heavy for it, and refuses to carry them, on the ground that it might be dangerous to his vessel to do so, and the owner of the goods says, "If you put my goods on shore, I will go with them," and he does so; would that amount to a conversion in the master of the vessel, even assuming his judgment as to the weight of the goods to be quite erroneous, and that there really would be no danger whatever in taking them? In order to constitute a conversion, it is necessary either that the party taking the goods should intend some use to be made of them, by himself or by those for whom he acts, or that, owing to his act, the goods are destroyed or consumed, to the prejudice of the lawful owner. As an instance of the latter branch of this definition, suppose, in the present case, the defendant had thrown the horses into the water, whereby they were drowned, that would have amounted to an actual conversion; or as in the case cited in the course of the argument, of a person throwing a piece of paper into the water; for, in these cases, the chattel is changed in quality, or destroyed altogether. But it has never yet been held that the single act of removal of a chattel, independent of any claim over it, either in favor of the party himself or any one else, amounts to a conversion of the chattel. In the present case, therefore, the simple removal of these horses by the defendant, for a purpose wholly unconnected with any the least denial of the right of the plaintiff to the possession and enjoyment of them, is no conversion of the horses, and consequently the rule for a new trial ought to be made absolute.

With respect to the amount of damages, it was altogether a question for the jury. I am not at all prepared to say, that if the jury were satisfied that there had been a conversion in this case, they would be doing wrong in giving damages to the full value of the horses. I do not at all rest my judgment on that point, but put it aside entirely. If the judge had told the jury that there was evidence in the case from whence they might infer that a conversion of these horses had taken place at some time, it would have been different; but his telling them that the simple act of putting them on shore amounted to a conversion,

I think was a misdirection, on which the defendant is entitled to a new trial.

ALDERSON, B. I am of the same opinion. As to the last point, it would be a strange thing to disturb the verdict on the ground that the jury had given as damages the full value of these horses; for it appears that they were ultimately sold, and the plaintiff never regained possession of them. If, therefore, the original act of taking the horses really amounted to a conversion of them, it would be a strong proposition for us to say that the plaintiff was not entitled to recover their full value, as damages for the wrongful act done. But the mere circumstance which the learned judge in this case put to the jury, as constituting the conversion, does not necessarily amount to one. Any asportation of a chattel for the use of the defendant, or a third person, amounts to a conversion; for this simple reason, that it is an act inconsistent with the general right of dominion which the owner of the chattel has in it, who is entitled to the use of it at all times and in all places. When, therefore, a man takes that chattel, either for the use of himself or of another, it is a conversion. So, if a man has possession of my chattel, and refuses to deliver it up, this is an assertion of a right inconsistent with my general dominion over it, and the use which at all times, and in all places, I am entitled to make of it, and consequently amounts to an act of conversion. So the destruction of the chattel is an act of conversion, for its effect is to deprive me of it altogether. But the question here is where a man does an act the effect of which is not for a moment to interfere with my dominion over the chattel, but, on the contrary, recognizing throughout my title to it, can such an act as that be said to amount to a conversion? I think it cannot. Why did this defendant turn the horses out of his boat? Because he recognized them as the property of the plaintiff. He may have been a wrong-doer in putting them ashore; but how is that inconsistent with the general right which the plaintiff has to the use of the horses? It clearly is not; it is a wrongful act done, but only like any common act of trespass to goods with which the party has no right to meddle. Scratching the panel of a carriage would be a trespass; but it would be a monstrous thing to say that it would be a ground for an action of trover; and yet to that extent must the plaintiff's counsel go if their argument in this case be sound. But such is not the law; and the true principle is that stated by Chambre and Holroyd, JJ., when at the bar, in their argument in the case of *Shipwick v. Blanchard*, that "in order to maintain trover the goods must be taken or detained with intent to convert them to the taker's own use, or to the use of those for whom he is acting." This definition, indeed, requires an addition to be made to it; namely, that the destruction of the











goods will also amount to a conversion. For these reasons I think, in the case before us, the question ought to have been left to the jury to say whether the act done by the defendant of seizing these horses and putting them on shore, was done with the intention of converting them to his own use, *i. e.*, with the intention of impugning, even for a moment, the plaintiff's general right of dominion over them. If so, it would be a conversion; otherwise not.

GURNEY, B. If it had been left to the jury, on the whole of the evidence in this case, to say whether a conversion had taken place or not, I think there was abundant evidence from which they might have drawn an affirmative conclusion. But the judge only left that question to them on one part of the evidence, namely, that of the defendant's taking these horses out of the boat, and putting them ashore; and I cannot agree to the position that that act, standing alone, amounts to a conversion.

ROLFE, B. I quite concur with the rest of the court. During the argument I had some little doubt, owing to the difficulty which I felt in defining what is a sufficient exercise of an act of ownership over chattels to amount to a conversion, so as to support an action of trover, as distinguished from such an interference with it as will only afford ground for an action of trespass. But that such a distinction does exist in law between these actions, in this respect, appears from the long list of cases to be found in the books on the subject; so that whatever difficulties may be experienced in applying that distinction, its existence must be recognized. In all the cases on this subject, there has been proof of a trespass having been committed; but there was a further question, namely, whether there was not a conversion also. In every case of trover there must be a taking with the intent of exercising over the chattel an ownership inconsistent with the real owner's right of possession. Now suppose, instead of actually removing the horses from the boat, the defendant had waved his hand, or cracked a whip, and so made the animals jump out of the boat, would that amount to a conversion? I do not see how, on the hypothesis of Mr. Watson, any other answer could be given than in the affirmative; for if the principle be that any thing which controls the position of the chattel while in my possession, will amount to a change of ownership, I do not see how the effecting of that change by frightening the animal which constitutes my property, is distinguishable from any other means adopted for the same purpose. Again, suppose I, seeing a horse in a ploughed field, thought it had strayed, and under that impression led it back to pasture, it is clear that an action of trespass would lie against me; but would any man say that this amounted to a conversion of the horse to my own use? Or suppose a man drives his carriage up into

an inn yard, and the innkeeper refuses to take it and his horses in, but turns them out into the road, could it be said that he thereby converted them to his own use? Surely not. The same principle applies to the case which has been cited, of *Bushel v. Miller*, where a party was held to have a right to move certain goods of another person, provided he put them back again; his not putting them back may give the other a right to bring trespass against him, on the ground that his subsequent neglect made him a trespasser *ab initio*; but it is clear that there was no conversion of the chattel. So that we find the distinction to which I have alluded, between trespass and trover, continually recognized in law. I quite agree with my brother Gurney, that if the learned judge in the present case had not put the conversion to the jury as founded on the single fact of taking the horses on shore, but had left it for their consideration on the whole case as it stood, not only was there evidence of a conversion, but there was such as would have fully warranted the jury in coming to the conclusion at which they arrived. The question, however, was not so left to the jury, and this rule to set aside the verdict for misdirection must therefore be made absolute.

*Rule absolute.*<sup>1</sup>

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### CAUNCE v. SPANTON.

IN THE COMMON PLEAS, NOVEMBER 6, 1844.

[Reported in 7 *Manning & Granger*, 903.]

TROVER for a cart. Plea: Not guilty. Under which it had been agreed, under a judge's order, that the defence of lien might be set up. A summons had been taken out by the defendant to add a plea of "not possessed,"<sup>2</sup> which summons had been dismissed by an order of Tindal, C. J., upon the terms above stated.<sup>3</sup>

At the trial before Cresswell, J., at the sittings for London after last term, the evidence of the conversion was that the plaintiff demanded the cart of the defendant (upon whose premises it had been standing), and at the same time offered to pay whatever might be due for the standing; but that the defendant refused to deliver it up, upon the ground that one

<sup>1</sup> *Sparks v. Purdy*, 11 Mo. 219; *Eldridge v. Adams* 54 Barb. 417; *Jordan v. Greer*, 5 Sneed (Tenn.), 165, acc. — ED.

<sup>2</sup> Supposing "not possessed" had been pleaded, *quare*, whether upon proof of a joint possession in the plaintiff and Bartlett, the defendant would not have been entitled to a verdict, on the ground that an allegation of seisin or of possession, generally, must be taken to import an assertion of sole seisin or sole possession. See *Edwards v. Bishop of Exeter*, 5 New Cases, 660; 7 M. & Gr. 173, n.

<sup>3</sup> See *White v. Teal*, 12 A. & E. 106.









Bartlett was a part-owner of it,<sup>1</sup> and that he had given the defendant an indemnity. The learned judge ruled that this was sufficient evidence of a conversion; and the plaintiff obtained a verdict, damages £16.

*Byles*, Serjt., now moved for a new trial, upon the ground of misdirection. He submitted that demand and refusal is not evidence of a conversion where the party has a lien upon the chattel. *Stanclyffe v. Hardwick*.<sup>2</sup>

MAULE, J. Here the ground of refusal is a claim of right on the part of Bartlett. *Per Curiam. Rule refused*.<sup>3</sup>

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### THOROGOOD v. ROBINSON.

IN THE QUEEN'S BENCH, JANUARY 15, 1845.

[Reported in 6 *Queen's Bench Reports*, 769.]

CASE for an excessive distress, with a count in trover, for lime, flints, and breeze. Pleas: To the count in trover 1, Not guilty; 2, Not possessed. Issues thereon. No question arose on the counts for an excessive distress.

On the trial, before Lord Denman, C. J., at the Middlesex sittings after last Michaelmas term, it was proved for the plaintiff that he was a lime-burner, and, in January, 1844, was in possession of some land, and of the lime, breeze, &c., in the declaration mentioned, which were lying on the land. The lime had been burnt in kilns on the premises from chalk dug there by the plaintiff. The defendant had recovered judgment in ejectment for the land, and, on the day mentioned in the declaration, he entered under the writ of possession, and turned two of plaintiff's servants off the premises, who at the time were loading a barge there with part of the lime. He refused to let them do any thing to the kiln fires, or put any more of the lime on the barge. The defendant's evidence showed that he was entitled to the land as landlord of a person in whose absence the plaintiff had entered without title. The Lord Chief Justice told the jury that it was not every dealing with another person's goods that amounted to a conversion, but only such as deprived the real owner of them; that under the circumstances

<sup>1</sup> The refusal being accompanied by a statement of the ground of that refusal, *quare*, whether the allegation of part-ownership would not have been evidence under a plea of "not possessed," to negative the sole possession; *vide supra*, 464.

<sup>2</sup> 2 C., M. & R. 1; 5 Tyrwh. 551; 3 Dowl. P. C. 762.

<sup>3</sup> *Wilson v. Anderton*, 1 B. & Ad. 450; *Catterall v. Kenyon*, 3 Q. B. 310; *Lee v. Bayes*, 18 C. B. 599; *Doty v. Hawkins*, 6 N. H. 247; *Rogers v. Weir*, 34 N. Y. 463; *Ball v. Liney*, 48 N. Y. 6; *Dowd v. Wadsworth*, 2 Dev. 120, acc. — ED.

it was reasonable that the plaintiff should have applied to the defendant to have the articles which belonged to plaintiff delivered to him again; but that it was a question for the jury whether the conduct of the defendant was a conversion of the lime and breeze. Verdict for defendant on both issues.

*Knowles* now moved for a new trial, on the ground that the verdict on both issues was against the evidence. The Lord Chief Justice ought to have told the jury that the facts amounted to a conversion. Any act taking from a party even the temporary possession of his goods is a conversion. *Keyworth v. Hill*.<sup>1</sup> "A conversion seems to consist in any tortious act by which the defendant deprives the plaintiff of his goods, either wholly or but for a time." 3 Stark. Ev. 1156 (3d ed. 1842). In *Baldwin v. Cole*, "a carpenter sent his servant to work for hire to the queen's yard; and, having been there some time, when he would go no more, the surveyor of the work would not let him have his tools, pretending a usage to detain tools to enforce workmen to continue until the queen's work was done. A demand and refusal was proved at one time, and a tender and refusal after. Holt, C. J. The very denial of goods to him that has a right to demand them is an actual conversion, and not only evidence of it, as has been holden; for what is a conversion but an assuming upon one's self the property and right of disposing another's goods; and he that takes upon himself to detain another man's goods from him without cause, takes upon himself the right of disposing of them." As to the second plea, the defendant must be regarded as a mere wrong-doer; he had never any title to the lime and breeze. The lime was, indeed, made from chalk dug on the premises; but it had been converted into an article of a different species; and, when a person makes wine, oil, or bread, out of another's grapes, olives, or wheat, it belongs to the new operator, who is only to make satisfaction to the former proprietor for the materials which he has so converted. 2 Black. Comm. 404.

LORD DENMAN, C. J. In leaving this case to the jury, I endeavored to act in conformity with the decision of this court in the case of *Needham v. Rawbone*,<sup>2</sup> and I said that it was a question for the jury whether

<sup>1</sup> 3 B. & Ald. 685.

<sup>2</sup> *Needham v. Rawbone*, Mich. T. 1844 (not reported). The action was trover for wearing apparel, books, and other goods. Plea: Not guilty. On the trial before Lord Denman, C. J., at the sittings in Middlesex after Michaelmas term, 1843, it appeared that the plaintiff had left his house, and in it the goods above mentioned, in the care of his servant. The defendant entered the premises, alleging an authority from the Court of Chancery, placed a man in charge of the house, took an inventory of the goods, locked up the rooms containing them, prevented the plaintiff's servant from having access to the rooms, and finally obliged him to quit the premises, leaving the property under the defendant's control. The Lord Chief Justice thought











the conduct of the defendant in turning the plaintiff's servants off the premises, and not letting them take away the lime and breeze, amounted to a conversion or not. I think the jury might fairly find that it did not. The defendant entered the premises with right, and had a right to turn off the plaintiff's servants. The plaintiff certainly had a right to the goods; but he should have sent some one with a proper authority to demand and receive them. If the defendant had then refused to deliver them, or to permit the plaintiff or his servants to remove them, there would have been a clear conversion; but it does not necessarily result from the facts proved in this case that the defendant was guilty of a conversion. I am inclined to think that the plaintiff is entitled to a verdict on the issue on the plea of not possessed, which will probably be given up, as it only affects the costs of that issue.<sup>1</sup>

PATTESON, J. The mere turning the plaintiff's servants off the premises could not amount to a conversion of the goods; for the defendant had a right to turn the servants off.

COLERIDGE, J. Neither the plaintiff nor his servants had any right to be upon the land; nor was the defendant bound to let them remain there for the purpose of removing the plaintiff's goods; what he was bound to do was, on demand, to let the plaintiff remove the goods, or to remove them himself to some convenient place for the plaintiff.

WIGHTMAN, J., concurred.

*Rule refused.*<sup>2</sup>

## TOWNE v. LEWIS.

IN THE COMMON PLEAS, APRIL 16, 1849.

[Reported in 7 Common Bench Reports, 608.]

TROVER for a bill of exchange. Pleas: Not guilty, and not possessed.

The cause was tried before Wilde, C. J., at the sittings at Westminster after the last term. The facts were as follows: The plaintiff, as there was no evidence of a conversion, and directed a nonsuit. Cockburn, in Hilary term, 1844, obtained a rule *nisi* for a new trial. In Michaelmas term, November 11, 1844, before Lord Denman, C. J., Williams, Coleridge, and Wightman, JJ.,

Whitehurst showed cause, and Cockburn and Petersdorff supported the rule, citing the usual authorities. LORD DENMAN, C. J., said it did not appear by the evidence that the plaintiff had not acquiesced in the taking, or that he might not have had the use of the goods if he had desired it.

*Cur. adv. vult.*

LORD DENMAN, C. J., in the same term (November 25th), stated, without further observation, that the court ordered the rule to be made absolute.

*Rule absolute.*

<sup>1</sup> This was agreed to on the defendant's part.

<sup>2</sup> See *Town v. Hazen*, 51 N. H. 596. — *En.*

indorser of a bill of exchange, had been sued by the defendant in the Lord Mayor's Court, and had paid the amount under an order of that court. He afterwards sent a person to the defendant to demand the bill, when the defendant told him it was not in his possession, and referred him to his attorney, to whom he had handed it for the purpose of suing upon it. The plaintiff's messenger declining to go to the attorney, the defendant said: "Then, call on Saturday, and in the mean time I will get it for you." The messenger accordingly called again on the following Saturday, but did not obtain the bill: whereupon the plaintiff immediately brought this action.

His Lordship left it to the jury to say whether, when the demand was made, the defendant meant to dispute the plaintiff's right to the bill, or whether he really meant to send it to him when he could obtain it, at the same time intimating a pretty strong opinion that there was no conversion.

A verdict having been found for the defendant,

*Humfrey* now moved for a new trial, on the ground of misdirection, and that the verdict was against evidence. The plaintiff was unquestionably entitled to the possession of the bill, and the defendant's neglect to restore it amounted to a conversion. [CRESSWELL, J. Did the defendant convert the bill, by putting it into the hands of his attorney?] Certainly not: he had at that time dominion over it, and a right to sue upon it. [CRESSWELL, J. Then, was he guilty of a conversion, by not immediately taking it out of his attorney's hands when his claim was satisfied?] Having fixed his own time for the redelivery of the bill, his neglect to do so was evidence of a conversion. The question which ought to have been left to the jury, is, whether the defendant prevented or delayed the plaintiff in obtaining possession of his property, without any justifiable excuse. [WILDE, C. J. Can that be said to amount to a conversion by the defendant, which is neither an assertion of title in himself, nor a denial of the title of the plaintiff, nor evidences an intention on the defendant's part to withhold the chattel from him?] In *M'Combie v. Davies*, it was held, that, taking the property of another by assignment from one who had no authority to dispose of it, as taking an assignment of tobacco in the king's warehouse, by way of pledge, from a broker who had purchased it there in his own name for his principal, and refusing to deliver it to the principal, after notice and demand by him, — none other than the person in whose name it is warehoused being able to take it out, — is a conversion. [WILDE, C. J. That was, in effect, a denial of title.] In *Catterall v. Kenyon*,<sup>1</sup> goods of the plaintiff had been taken in execution upon process against the goods of B., and placed upon the premises of

<sup>1</sup> 6 Jurist, 507.











the defendant, who was an innkeeper; upon a demand of them by the plaintiff, in the absence of the defendant, the wife of the defendant said that she would consult the attorney who had issued the execution, and, after having done so, refused, saying that she was not to deliver them up, and that he would save her harmless; and it was held that this was sufficient evidence of conversion. Lord Denman there said: "The case of *Verrall v. Robinson*<sup>1</sup> induced us to grant the rule; but I think that case does not apply: in that case, Lord Abinger and Alderson, B., considered that the chaise was in the custody of the law, and that the party with whom it was placed at livery was not at liberty to deliver it up after it had been attached by process out of the sheriff's court; after the attachment, the holder was passive, and no more than, as it were, an officer of the court, and was not justified in parting with it. Here, the goods of one party are by mistake taken by virtue of process against another, and, being placed on the premises of the defendant, the wife takes upon herself to inquire into the ownership of them, and, after inquiry, refuses to give them up. I think that the party's so depriving the owner of the possession of his goods is sufficient evidence of a conversion."

At all events, the plaintiff is entitled to a verdict on the issue upon not possessed.

WILDE, C. J. As to the issue last adverted to, the plaintiff is of course entitled to a verdict on that. Indeed, the whole strength of the defendant's case upon not guilty depends upon the plaintiff's right to a verdict upon not possessed. The verdict may be so entered from my notes.

As to the rest, the case appears to me to be quite free from difficulty. No doubt the conduct of the defendant was evidence whence the jury might infer whether or not he had been guilty of a conversion. But here there was no evidence that the defendant had any intention to deny the plaintiff's title to the bill, or to withhold the possession of it from him; nor was there any such unreasonable delay on the defendant's part as would warrant the jury in inferring a conversion; on the contrary, the whole conduct of the defendant was consistent only with a *bona fide* intention on his part to deliver up the bill as soon as he could conveniently obtain it. Authorities are not wanting to show that a party is not guilty of a conversion because he does not at once restore the chattel, where it is not at the moment in his possession and under his own immediate control. It seems to me that the evidence was properly submitted to the jury, and that their conclusion was the correct one.

COLTMAN, J. The authorities cited by Mr. Humphrey seem to me

<sup>1</sup> 2 C., M. & R. 495.

conclusively to dispose of his argument. Here there was a full and complete admission of the plaintiff's title to the bill, and a promise to deliver it to him. There was nothing more than evidence from which the jury might, if they pleased, have found a conversion, if they had been satisfied that there had been wilful and unreasonable delay on the defendant's part in complying with the plaintiff's demand. I think the matter was properly left to the jury, and properly disposed of by them.

CRESSWELL, J. I am entirely of the same opinion.

V. WILLIAMS, J. I also think there is no ground for finding fault with the summing up in this case, or with the conclusion the jury came to

*Rule refused.*

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### HEALD v. CAREY.

IN THE COMMON PLEAS, JANUARY 14, 1852.

[*Reported in 21 Law Journal Reports, Common Pleas, 97.*]

TROVER for the conversion of a case containing pictures, frames, &c. Pleas: first, not guilty; second, not possessed.

At the trial before Williams, J., at the sittings in Trinity term, 1851, the following facts were proved: The defendant was the London broker for a line of steamboats plying between London and Dunkirk, in communication with the Northern Railway of France. In August, 1850, the plaintiff was residing in Paris, and by his direction his valet, Nisbett, took seven cases of pictures, addressed "Nisbett, Custom House, London Bridge, per steamer," to the railway station, and got a receipt. On the arrival of the cases at Dunkirk, one of them appeared to have suffered damage. In conformity with a regulation of the French law, Richard, who was the agent of the railway company and of the steamboats at Dunkirk, detained the damaged case for official inspection by an officer of the "Tribunal de Commerce," and forwarded the others, with a bill of sale, deliverable to N., at the "Custom House, London Bridge, or order," &c. After the necessary official examination, Richard paid the charges and the export duty on the seventh case, and shipped it, and not knowing Nisbett's address, made out a bill of lading, making it deliverable to "Mr. Carey (the defendant), to hold at the disposal of Mr. G. Nisbett, Custom House, London Bridge, or order." The case arrived in the Thames on the 14th of August, but as neither the plaintiff nor Nisbett, nor any one for them, claimed the case within twenty-four hours after the ship's report, according to a provision on the margin of the bill of lading, the defendant, in order











to protect the owner and other parties, landed the case, paid the import duty for it, and placed it in the warehouse of Mr. Barber, on Brewer's Quay, with whom he was in the habit of warehousing goods arriving by the Dunkirk steamers. Barber afterwards removed the case in question, with other goods, to another warehouse of his, in Seething Lane, without the knowledge of the defendant, and there it was burned in an accidental fire. There were free and bonded parts in both warehouses.

The learned judge left three questions to the jury, all of which were answered in the negative: first, whether the plaintiff authorized the defendant to act as he did; secondly, whether the object of the defendant was to do the best he could for the consignee; thirdly, whether he acted as a prudent man would have acted, intending to do the best for the consignee. Upon these facts, and upon the answers of the jury, the learned judge directed a verdict for the plaintiff for £150, with leave to the defendant to move to enter a verdict for him, if there was no evidence of conversion, or a nonsuit, or to reduce the verdict to one for nominal damages, if the court should think it ought to be so reduced.

A rule having been obtained accordingly, in Michaelmas term, 1851, *Byles*, Serjt., and *G. R. Clarke* (January 12) showed cause. There was in this case evidence of a conversion. The conduct of the defendant throughout the whole transaction fully warranted a verdict for the plaintiff upon the issue of not guilty. In the first place, he was not bound to warehouse the package upon its arrival at all. By 8 & 9 Vict. c. 86, § 16, the law provides for small packages of goods such as this was, and if he had done nothing, it would have gone into the queen's warehouse. Nor was the defendant or his agent authorized to pay the duty, and thus incur a liability; and if so, then he was not authorized in warehousing the goods as he did.

[MAULE, J. It is difficult, perhaps, to say that they had authority to pay the duty, so that they could have maintained an action against the plaintiff for money had and received to his use.]

In *Fouldes v. Willoughby* it was held that a mere unauthorized act does not amount to a conversion, but in this case there is more. The jury find that the object was not to do the best for the consignee. There was, therefore, in this case some indirect motive for the unauthorized act. The judgment in *Fouldes v. Willoughby* shows that there need not actually be a conversion to the defendant's own use. Lord Abinger there says: "To constitute a conversion it is necessary that the party taking the goods should intend some use to be made of them, either by himself or by those for whom he acts, or that, owing to his act, the goods are destroyed, to the prejudice of the law-

ful owner." The motive, therefore, is to be taken into account. But, further, it appears from the passage just cited that, even if the motive were a fair one, still, if one does something to a man's goods without authority, that is a trespass; and if, owing to that act of his, the goods are lost, it is a conversion. The jury in this case also found that the act to which the loss was owing was not the act of a prudent man wishing to do the best for the owner of the goods. This, again, shows that the motive was indirect, and is an important element in considering whether there was evidence of a conversion. *Drake v. Shorter* also shows that the motive is important. Upon the point of conversion they also cited *Garside v. The Trent and Mersey Navigation Co.*,<sup>1</sup> *Bushel v. Miller*, *Alexander v. Southey*, *Evans v. Martell*,<sup>2</sup> and *Syeds v. Hay*. They then contended that, if there was evidence of a conversion, the plaintiff was entitled to more than nominal damages. *Finch v. Blount*;<sup>3</sup> *Mercer v. Jones*;<sup>4</sup> *M'Leod v. M'Ghie*.<sup>5</sup>

[WILLIAMS, J., referred to *Alsager v. Close*,<sup>6</sup> and to *The Countess of Rutland's Case*.']

*Watson*, *Bramwell*, and *Manisty*, in support of the rule. In the first place, Carey, the defendant, was justified in all he did, and therefore there was no conversion; and, in the next place, even if he was not justified, still there was no conversion for which he is liable in this action. The goods came rightfully into the defendant's possession. He was the consignee, and was agent either for the company or for the plaintiff, or for the two parties to hold for freight. By the plaintiff's act, the defendant had a positive duty cast upon him; namely, to take reasonable care of the goods. If he did not take that reasonable care of them, and they were lost in consequence, even that would not have been a conversion. But the question left to the jury on that point was, whether the plaintiff in fact gave any authority to the defendant to take care of the goods and warehouse them. If Carey, having accepted the bill of lading, had allowed the goods to be treated as derelict, and they had been sold to pay the duty, surely he would have been responsible to the plaintiff for the loss by that sale. Perhaps there was no positive obligation on Carey to pay the duty, but there was nothing wrong or incautious in his doing so. If the defendant was the agent of the steamboat company, the goods were lawfully in his possession, and a loss afterwards could not constitute a trespass or a conversion. In order to make an act a conversion, the person doing it must be repudiating the title of the true owner.

JERVIS, C. J. I am of opinion that the rule should be made abso-

<sup>1</sup> 4 Term Rep. 581.

<sup>2</sup> 12 Mod. 156.

<sup>3</sup> 7 Car. & P. 478.

<sup>4</sup> 3 Camp. 477.

<sup>5</sup> 2 Sc. N. R. 604.

<sup>6</sup> 10 Mee. & W. 576; s. c. 12 Law J. Rep. n. s. Exch. 50.

<sup>7</sup> 1 Roll. Abr. 5.









lute to enter a nonsuit. The question is, whether there was any evidence to prove that the defendant was guilty of a conversion. It was admitted that the question was one of law. The facts were that seven cases of pictures were despatched by the plaintiff to London, *via* Dunkirk, that one was broken, and after having been inspected at Dunkirk, was consigned by Richard, the agent of the railway company and the steamboats at Dunkirk, to Carey, the defendant, to the order of Nisbett, at the custom-house. It is said that Richard had no authority to do this; but the defendant acted innocently and accepted the bill of lading; and even if Richard had no express authority, Carey was guilty of no conversion. Carey received authority by the bill of lading to unload the goods, and was bound to do so within a given time. It is said he ought to have taken one of three courses, — either to leave the goods in the ship, or to allow them to go to the queen's warehouse, or he ought to have put them into a bonded warehouse, or with a bill of sight into a free warehouse. But even if he ought to have taken the first course, and even although he paid the duty without authority, that will not make him liable in the present action. His duty, as consignee, was to clear the goods and hold them safely for the plaintiff, and he discharged that duty, even if he had wrongfully paid the custom-house officers. The goods were lost through an accidental fire, for which neither he nor the shipping company was liable. He acted in the matter according to the best of his judgment. It is first said that he was not authorized in fact by the plaintiff to do what he did; but if the goods were consigned to him, whether he had in fact authority to pay the duty or not, he was authorized to put them in safe custody. Next, it is said that the defendant did not act as a prudent man would have done. But it is not necessary to consider that point, as that would not make him guilty of a conversion. Further, it is said that the defendant acted from indirect motives. But if a man acts not wrongfully, though from improper motives, that does not make him guilty of a conversion.

MAULE, J. The result of the evidence and the argument in this case is, that the goods were destroyed by an accidental fire under circumstances which make the owner bear the loss. The question is, whether the evidence showed that Carey had been guilty of a conversion. There is no doubt that a negligent dealing with goods by a bailee is not a conversion; there is no doubt that an act consequent upon negligence of the bailee in which he did not participate would not amount to a conversion by him. He is not liable for what takes place, unless it happen when a dominion is asserted by him over the chattel which is the subject of the action. If the thing be destroyed, and the act not participated in by the bailee, but the thing be wrong-

fully in his possession, there may be a conversion, and an action may lie, although the defendant did not participate in the act. But where there is no unlawful possession, and where the destruction is not participated in by the bailee, there is no conversion. The goods in this case were in the hands of the defendant, under condition to be held by him for the plaintiff. He had something to do in respect of them; for it was admitted by the plaintiff, as well as the defendant, that he was not altogether a stranger, but was to do what was needful in the matter. He paid the duty, and it may be that he could not charge the plaintiff with the amount. I am inclined to think that he could; but if he could not, the only penalty was the loss of the money paid. It was his duty to put the goods into a fit place; and it is not said that the place into which they were put was not a fit one. I do not think that there was any negligence, and there certainly was no conversion. There is no conversion unless where the act is done in the assertion of dominion over the goods. I also think that there was no negligence, and that the defendant, if liable at all, would have been liable in trover. But that is not the point in the case. I am of opinion, therefore, that the verdict on the evidence ought to have been for the defendant on the plea of not guilty. The jury have found that the defendant did not intend to do what was best, and what a prudent man ought to have done; but as it appears in the evidence that he did nothing which he might not properly do, I think he was not guilty at all, and at all events, that he was not guilty of a conversion.

CRESSWELL, J. I think it is very plain that the plaintiff is not entitled to recover. The result is the same as to Carcy, whether he be identified with the shipping company or not. It would indeed be very singular if any thing which took place in this case could be taken as amounting to a conversion. The defendant received the goods to take care of for Nisbett or Heald. How can it be said that he has been a conversioner? He has never repudiated their right, or done any thing inconsistent with his receiving the goods to take care of them. It is not said that he put them into a wrong place. He put them into a proper place for Nisbett to get them from. That was no conversion, or only a conversion for the real owner. But it is said that he paid duty upon the goods, which he ought not to have done. He paid that duty in order to put the goods into a free warehouse; and it may be said that he need not have paid the duty, but could have put them into another warehouse. He may not perhaps be able to recover back the money paid for the duty if it was spent uselessly. But that was no conversion, as he was still acting for the owner of the goods. It is, therefore, perfectly clear that there was no conversion of the plaintiff's goods, and that the rule for a nonsuit should be made absolute.











WILLIAMS, J. I am of the same opinion. It appears that Richard was agent for the shipping company, and the seventh package having met with an accident, it was his duty to forward it to London. He, therefore, consigned it to Carey, who, on its arrival, put it into a place of usual and proper custody, where it was accidentally burned. I am of opinion that there is nothing in the case which, in point of law, is equal to a conversion, nor any thing for which the defendant is liable.

*Rule absolute to enter a nonsuit.*<sup>1</sup>

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SIMMONS v. LILLYSTONE.

IN THE EXCHEQUER, FEBRUARY 12, 1853.

[Reported in 8 Exchequer Reports, 431.]

THE second count<sup>2</sup> was in trover for the conversion of goods and chattels, to wit, five hundred pieces of timber.

Pleas (*inter alia*) to the whole declaration, not guilty.

The plaintiff joined issue on the first plea.

At the trial, before Pollock, C. B., at the London sittings after last Michaelmas term, it appeared that the plaintiff carried on the business of a mast, oar, and block maker at Milton next Gravesend. The evidence in support of the second count was, that certain pieces of timber or spars used for making bowsprits, and belonging to the plaintiff, being on the defendant's land, he caused them to be removed; and upon the timber being again placed there, and having become imbedded in the soil, the defendant directed his workmen to dig a saw-pit in his land, and in so doing they cut through the timber, leaving the pieces there, and part of them was afterwards carried away by the tide of the river, which at high water flowed over the land, the other part remaining imbedded in the soil.

It was objected, on the part of the defendant, that there was no evidence of a conversion. His Lordship was of opinion that there was *prima facie* evidence of a conversion. The jury found a verdict for the plaintiff; damages £60.

*Bramwell*, in last Michaelmas term, having obtained a rule *nisi*,

*Shee*, Serjt., and *Rose* showed cause in Hilary term (January 27).

There was evidence of a conversion. In order to constitute a conversion, it is not necessary that there should be an acquisition of property by the defendant: it is sufficient if there be a deprivation of property to the plaintiff. *Keyworth v. Hill*. [PARKE, B. Here the defendant never intended to take to himself any property in the tim-

<sup>1</sup> See *Gr. W. R. R. Co. v. Crouch*, 3 H. & N. 183. — ED.

<sup>2</sup> Only so much of the case is given as relates to this count. — ED.

ber.] If a person purposely left the gate of a field open, so that a horse escaped, that would amount to a conversion. [PARKE, B. The form of a count in trover, prescribed by the Common-law Procedure Act, 15 & 16 Vict. c. 76, Sched. (B.), is, "that the defendant converted to his own use, or wrongfully deprived the plaintiff of the use and possession of, the plaintiff's goods." Suppose a person threw a stone into a room through an open window, and broke a looking-glass, would that be a conversion of it?] It is submitted that any wilful damage to a chattel, whereby the owner is deprived of the use of it in its original state, is a conversion. [PLATT, B. Taking wine from a cask and filling it up with water is a conversion of the whole liquor. *Richardson v. Atkinson.*] The principle laid down in *Fouldes v. Willoughby* is, that a mere wrongful asportation does not amount to a conversion, unless the taking or detention of the chattel is with intent to convert it to the taker's own use or that of some third person, or unless the act done has the effect either of destroying or changing the quality of the chattel. Here the cutting of the timber destroyed it as timber. In the case of two tenants in common, each has an interest in the chattel, so that nothing short of an absolute destruction of it will amount to a conversion; but, in ordinary cases, any injury which alters the nature or quality of the chattel is a conversion of it.

*Willes*, in support of the rule. The cutting of the timber was a mere act of trespass, and not a conversion. In *Richardson v. Atkinson*, the conversion consisted in adding water to the remainder of the wine. If a bailee of a cask of wine consumes part of it, that is not a conversion of the whole. *Philpott v. Kelley*. In *Kent's Commentaries*, vol. ii. p. 360 (4th ed.), in treating of "original acquisition by succession," various instances are adduced of one person's property becoming that of another, in consequence of the nature of the article being changed by reason of the latter having expended upon it his skill, labor, or materials; but there is no case to the effect that an injury to a chattel vests the property in it in the wrong-doer. The question is, whether the act done was an assertion of property on the part of the defendant, or a mere act of violence. *Heald v. Carey* decided that there is no conversion of goods for which trover will lie, unless there be a repudiation of the right of the owner, or the exercise of a dominion over them inconsistent with that right.

PARKE, B. The question which relates to the count in trover is, whether there was any evidence of a conversion. Now the evidence was that the pieces of timber were cut in two by the defendant; that they were left imbedded in the soil,—not applied to the defendant's own use,—and that part of them was carried away by the tide. Without adverting to the plea of justification, we are all of opinion that there











was no sufficient evidence of a conversion to entitle the plaintiff to a verdict on the plea of not guilty. In order to constitute a conversion there must be an intention of the defendant to take to himself the property in the goods, or to deprive the plaintiff of it. If the entire article is destroyed, as, for instance, by burning it, that would be a taking of the property from the plaintiff and depriving him of it, although the defendant might not be considered as appropriating it to his own use. In this case nothing is done but cutting the timber, and, by accident, it is washed away by the river, — not purposely thrown by the defendant to be washed away; consequently, we think that does not amount to a conversion. Assuming that it was *prima facie* a conversion, then the question would arise whether that conversion was not excused by the right which the defendant had to make the saw-pit, and to cut the timber in making it, if he was not able to do it in any other way. But, without deciding that, we think that there was no evidence to warrant the jury in finding that this timber was converted by the defendant to his own use; that is, either by taking the whole property to himself, or asserting title in another, or depriving the plaintiff of the property. None of those alternatives are made out by the evidence, and consequently there ought to be a verdict for the defendant on the plea of not guilty to the count in trover. *Rule accordingly.*<sup>1</sup>

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### BURROUGHES v. BAYNE.

IN THE EXCHEQUER, FEBRUARY 10, 1860.

[Reported in 5 Hurlstone & Norman, 296.]

TROVER for a billiard table with the appurtenances. Pleas: first, not guilty; secondly, that the goods were not the plaintiff's. Whereupon issue was joined.

At the trial before Bramwell, B., at the sittings in London after Trinity term, it appeared that, in July, 1857, the billiard table in question had been hired of the plaintiff by one Filmer, who kept a hotel in Harley Street, Cavendish Square, under the following agreement:—

“MESSRS. BURROUGHES :

“18 Harley Street.

“Gentlemen, — In consideration of you having supplied me (on hire) with a full-sized slate billiard table, and the following appendages, viz., twelve cues, &c., I agree to hire the said table and appendages for twenty weeks, at the rent of 14s. per week, to be paid every four weeks. I also agree to pay £5 down as a collateral security. Should

<sup>1</sup> See *Byrne v. Stout*, 15 Ill. 180; *Sanderson v. Haverstick*, 8 Pa. 294. — Ed.

I at the expiration of twenty weeks wish to purchase the said table, &c., I agree to pay down the balance between the money paid as rent and collateral security and the amount in full of the said table, &c., namely, £91.

"Hire of table and appendages to commence from May 26, 1857. And the table and appendages to remain your property till paid for in full.

"I also hold myself responsible for any damage done to the same by fire or otherwise, excepting ordinary wear and tear.

"THOMAS FILMER."

The table remained in Filmer's possession till the 7th of March, 1859, when the following further agreement was drawn up, indorsed on the first agreement, and executed by Filmer:—

"Memorandum.—That there is now due to Messrs. Burroughes from T. Filmer the sum of £80, being the balance of the purchase-money for the billiard table; and that T. Filmer hereby agrees to pay the said sum of £80 by instalments of £5 per week, the first instalment to be paid on the 9th of March, 1859; and in default of payment of any one instalment, the whole sum remaining unpaid to become due and to be paid forthwith; and J. F. Penton hereby agrees, in consideration, &c., to guaranty the due payment of the said instalments, and in default of one instalment, then the due payment of the full amount remaining due.

"THOMAS FILMER."

This agreement was never completed, Penton having declined to become security. At the beginning of April the plaintiff demanded the billiard table of Filmer, when he found that a bill of sale had been executed by Filmer to the defendant, under which the defendant's man was in possession of the goods in Filmer's house. The billiard table was included in the bill of sale. On the 13th of April a clerk of the plaintiff's attorney served on the defendant, at his house in Brook Street, a formal demand of the billiard table. The defendant asked to see the agreement, which the plaintiff's son accordingly produced to him on the next day. The defendant then asked for a copy, that he might consult his attorney, but the plaintiff would not allow a copy to be taken. The plaintiff's son deposed that the defendant seemed at first willing to give up the table, but afterwards, on reading the two agreements, said, "If it was a hiring only, he would give up the table, but it appeared to be a purchase. The table was in the inventory, and, unless the plaintiff could prove that it was his, he would stick to it." The plaintiff then caused notices to be served on the defendant and the man in possession that on the following morning, the 15th of April, at twelve o'clock, he would call to fetch away the table. The plaintiff and











his men called on the next day at Filmer's house in Harley Street at the time appointed and saw the man in possession, but could not obtain the billiard table, the door of the billiard-room being locked. The plaintiff never got the billiard table, which was ultimately seized and sold by the landlord under a distress for rent. The defendant swore that on the morning of the day last mentioned he had given instructions to the man in possession not to detain the table. The man in possession said that he told the plaintiff that he might have the table, but he could not find the key of the room in which it was. The jury found a verdict for the plaintiff.

*Petersdorff*, Serjt., in Michaelmas term, obtained a rule for a new trial, on the ground that there was no evidence of a conversion, and that the verdict was against the evidence.

*C. E. Pollock* showed cause (February 9). There were two occasions on which the conduct of the defendant was such as to be evidence of a conversion. After the agreement had been produced to the defendant, he had no right to detain the billiard table, but was bound at his peril to give it up at once. Secondly, when the plaintiff's men called by appointment on the 15th of April, the defendant should have been ready to give up the table. Though it may be true that, if this was the first communication which had taken place between the parties respecting the table, it would be very slight evidence of a conversion, yet, when taken in connection with the defendant's threat to "stick to" the table, it was evidence on which the jury were fully warranted in acting. In fact, the mere taking an assignment of the plaintiff's property from one who had no right to dispose of it was a conversion. *M'Combie v. Davies*.

*Petersdorff*, Serjt., in support of the rule. There was no evidence of any intention on the part of the defendant to detain the table when the plaintiff and his men called for it. When asked on the former occasion to deliver it up, the defendant doubted as to the right of the plaintiff, and desired to be satisfied on the point; but he never said that the plaintiff should not have the table. Expressing a desire to inquire of his attorney what was the effect of the agreement is no evidence of a wrongful conversion. [MARTIN, B. A man is entitled to his chattel property at all times. If another obstructs his enjoyment of it, by exercising an act of ownership over it to his prejudice, that is a conversion.] What the defendant said was not a refusal to give up the property, but merely an evasive answer. The defendant was not in the actual possession of the billiard table at the moment when the demand was then made upon him. He subsequently told the man in possession to give it up when the plaintiff should apply for it. [CHANNELL, B. That was not communicated to the plaintiff. MAR-

TIN, B. If a man finds a watch in the street, and another goes to him and demands it, if the former says, "I am very desirous of giving it up to the real owner, but I wish to ascertain who he is," that is not a conversion. CHANNELL, B. If the defendant took so much time to consider whether he would give up the table, and after that did not choose to take care that it should be given up when the plaintiff called for it, surely that was a matter which the jury were entitled to consider.] The judge is dissatisfied with the verdict. [MARTIN, B. That might be conclusive, if the learned judge reported that he believed that the plaintiff or his witnesses had spoken falsely. BRAMWELL, B. I do not think that any untruth was told on either side.] There was no refusal to deliver up the table. [POLLOCK, C. B. The word "refusal" is ambiguous. If by refusal permanent refusal is meant, that is a conversion, and not merely evidence of a conversion. Mere delay in complying with a demand hardly amounts to a refusal, if it is a reasonable delay for the purpose of ascertaining the justice of the demand.]

*Cur. adv. vult.*

The following judgments were now pronounced:—

MARTIN, B. The question in this case was, whether there was evidence to go to the jury of a conversion; and we are all of opinion that there was. The case, as it seems to me, is of considerable importance. There is no more common cause of action than where an owner of goods complains that another has wrongfully taken possession of them. The law has provided four forms of action applicable to such a state of things. First, the action of trespass, which appears more immediately directed to the taking of a man's property out of the possession of the owner; secondly, the action of replevin in respect of goods taken but restored to the owner by process of law. But at common law the more direct remedy for the recovery of possession, or damages, where a chattel was detained from the owner, was the action of detinue. There existed, however, an objection to that action, which was that the defendant was entitled to wage his law; and the consequence was that the defendant in an action of detinue, by himself swearing to the non-existence of the cause of action, could at once defeat the plaintiff. In consequence of this, the courts of law in very early times invented the action of trover. They permitted the plaintiff to state that he lost goods which he never lost, and that the defendant found goods which he never found, and that the defendant converted the goods so found to his own use. The courts took upon themselves to prohibit the defendant from denying either the averment of the losing or the finding by the defendant; and thus they gave an action (a species of action on the case) in which the defendant could not wage his law. That, I believe, was the origin of the action of trover,—an action devised for









the purpose of preventing the plaintiffs from being defeated by the wager of law. The origin of the action of *indebitatus assumpsit* was the same. For the purpose of preventing the wager of law in an action to recover a debt, the courts devised the action of *indebitatus assumpsit*, wherein it was alleged that the defendant was indebted to the plaintiff, and, being so indebted, he promised to pay the debt, but broke his promise. This was an action on the case, and wager of law could not be made. This, I believe, was the true origin of the action of trover, and, in my judgment, we ought to extend its operation to all cases where a right of action in detinue properly exists, and not throw difficulties in the way of a man's recovering where his goods are wrongfully detained. I myself have always understood that trover was the action whereby a person entitled to the possession of goods wrongfully detained from him was entitled by law to recover damages for their detention. I do not think there is any necessity to discuss the original meaning of the words "trover" or "conversion;" they are technical expressions used in an action given by the law to enable a man to recover damages for the unlawful detention of his property. I freely admit that the word "conversion" is an unfortunate expression. Undoubtedly, in the great majority of cases where an action of trover is brought, no conversion in one sense has taken place; the goods are in the same state in which they always were; there is no actual conversion in the sense in which a person, not a lawyer, might possibly understand the term. In ordinary cases, the plaintiff's proof is much the same as would be required in an action of detinue. But the word "conversion," by a long course of practice, has acquired a technical meaning. It means detaining goods so as to deprive the person entitled to the possession of them of his dominion over them. In *Wilbraham v. Snow*<sup>1</sup> there is a note of Serjeant Williams, which, I apprehend, is as good an authority on this subject as exists. He says: "So where a carpenter, who worked in the king's yard, refused to go there any more, upon which the surveyor would not let him have his tools until the king's work was done, under a pretended usage to do so, a demand and refusal being proved, it was held, by Holt, C. J., that the denial of goods to him who has a right to demand them is an actual conversion, and not evidence of it only; for what is a conversion but an assuming upon one's self the property in and right of disposing of another's goods? And whoever detains another man's goods from him without cause takes upon himself the right of disposing of them." Now I adopt that as the true meaning of the word "conversion," in reference to this action, and the same rule has been laid down in modern

<sup>1</sup> 2 Wms. Saund. 47 g.

times. There is a case, *Fouldes v. Willoughby*, which I have long considered, and often heard cited as laying down the true rule upon this subject. In that case a ferryman at Birkenhead had had some horses put on board his boat to bring to Liverpool; he turned them out, and the horses were left upon the road. An action of trover was brought, and the question was, whether or not trover lay for their value. The court were of opinion that it did not; and the distinction between the action of trespass and trover was much discussed. Alderson, B., in delivering his judgment, says: "Any asportation of a chattel for the use of the defendant or a third person amounts to a conversion, for this simple reason: that it is an act inconsistent with the general right of dominion which the owner of the chattel has in it, who is entitled to the use of it at all times, and in all places. When, therefore, a man takes that chattel, either for the use of himself or of another, it is a conversion." I entirely accede to this view of the law, which is simple and of easy application.

Apply it to this case. The facts were these: A person had hired a billiard table of the plaintiff, and then had executed a bill of sale to the defendant; and I own that I am not prepared to state that the taking possession under that bill of sale was not an act of conversion, for it seems to me it falls within what is stated by Alderson, B., that it is an act by which the defendant took possession of the chattel for the use of himself from a person who had no right to give it. I am by no means inclined to say that the simple taking possession by the defendant under the bill of sale was not a conversion of those goods. What further took place, however, is this: The plaintiff went to the defendant and showed him the document under which the billiard table was hired. Thereupon the defendant said he would give it up; but, on turning over the paper, he found something which was an incomplete contract for sale, and he then alleged that there was a sale, or that he supposed there was, and refused to give it up. He said, in effect, "You are not entitled to it," and he did not deliver it up. In the evening the plaintiff told the defendant that at twelve o'clock on the following day he should send for the table for the purpose of carrying it away. Accordingly the plaintiff did send, and could not get it, it being locked up. In the mean time the defendant had found that he was in error, and had directed the man in possession to give up the billiard table. If the key could have been obtained, it is suggested that it would have been given up. The plaintiff, however, went to get the billiard table in pursuance of his notice; and I think it was the duty of the defendant to be ready to give it to him when he came for it. The consequence was that the billiard table was distrained by the landlord for rent. If it had been delivered up to the plaintiff on the











day appointed, when he was entitled to have it, this would not have happened. I think that this was evidence to go to the jury of a conversion. I myself should have directed the jury to find a verdict for the plaintiff, if they believed the evidence adduced on his behalf. For these reasons, I think the rule ought to be discharged.

CHANNELL, B. I am also of opinion that this rule ought to be discharged. My brother Martin has gone so fully into the law which applies to the case, that I propose very shortly to state the grounds on which I agree in the opinion which he has expressed. First, it was said that there was no evidence which ought to have been submitted to the jury. I cannot think that there is any good ground for the rule in that respect. The case of the plaintiff did not exactly tally with that of the defendant; because the evidence on the part of the defendant, though in many respects consistent with that on the part of the plaintiff, qualified, in some degree, the case of the plaintiff; but that was for the jury. On that ground, however, the application entirely fails.

The next ground for setting aside the verdict is, that the finding is against the evidence. I am not called upon to say, if the jury had found a different verdict, that I should have felt myself at liberty to set it aside; all I say is, there was evidence to warrant the finding of the jury. I desire to be understood that I do not mean to state or suggest that every detention is a conversion; I guard myself against any such supposition. Every asportation is not a conversion; and therefore it seems to me that every detention cannot be a conversion. If it were, the mere removal of a chattel, independently of any claim over it in favor of the party himself, or any one else whatever, would be a conversion. The asportation of a chattel for the use of the defendant or third persons, amounts to a conversion, and for this reason, whatever act is done inconsistent with the dominion of the owner of a chattel, at all times and places over that chattel, is a conversion. On the other hand, the simple asportation of a chattel, without any intention of having further use of it, though it may be a sufficient foundation for an action of trespass, is not sufficient to establish a conversion. I apply to the case of detention somewhat the same rule as was laid down in *Fouldes v. Willoughby* with reference to a mere asportation. Now, what are the facts? The billiard table, which is admitted to be the property of the plaintiff, was taken by the defendant under a claim to exercise some dominion over it, because he claimed a right and power to detain it, independently of the interest of any other person, viz., under a claim as owner inconsistent with the right of the actual owner. Then, when the billiard table was in his possession, under a claim of right, the plaintiff applied for it. It is said that on that occasion there was no formal demand and refusal. I agree

that is so; but the defendant at first said that the property was his, and that which afterwards passed, in my judgment, amounted to a demand and refusal. The defendant was not satisfied, and a second interview took place. Then the plaintiff's son produced a document, and the defendant, having inspected it, at first said that it was a hiring only; but, on the other side, there was something which might possibly amount to a sale, and accordingly he claimed to exercise some right over the table, namely, a right to consider for himself, till the next day, whether he would detain it; but down to that moment he had detained it as a matter of right. It is said he did not neglect to deliver the billiard table, because in fact he had not got it, but it was at another place, and that he did no more than to require, for himself, further time to consider. Supposing that down to this time there had been a conversion, I cannot say it was waived by the notice. On the contrary, the notice strengthens the plaintiff's right to recover. Putting it most in favor of the defendant, it seems to me it may have amounted to an intimation on the part of the plaintiff to this effect: "You shall have till to-morrow, when I will send some one to receive my property. Till then you may consider whether you will give it up." It was the defendant's duty to have some person on the spot to deliver it up. The plaintiff had done all that he could be reasonably expected to do. He did not get his property, and therefore brought this action. I think we may also connect the lapse of time between the unconditional application on the part of the plaintiff and the issuing of the writ; and, putting all these circumstances together, I am clearly of opinion that there was evidence which warranted the jury in finding a conversion. It may be this view is not satisfactory to my brother Bramwell, who tried the cause. But, though he says he would have adopted the view of the defendant, so far as it differs from the view presented on the part of the plaintiff, yet he wishes that, if we are of opinion upon the facts stated in the evidence of the defendant that there was a conversion, we should say so, and not act on his impression that he would have found a different verdict. I think, therefore, on the several grounds made, there is no reason for sending the case down for a new trial, and that this rule should be discharged.

BRAMWELL, B. I think, if any thing was necessary to show the impolicy of this form of action, and of using words in any other than their primary signification, it would be the difference of opinion which has arisen as to the meaning of the term "conversion." It seems to me that, after all, no one can undertake to define what a conversion is. Some decided cases may enable one to come to a conclusion, but in cases not similar there will always be a difficulty. As to this particular case, I think there was no misdirection; certainly, in a technical sense,











there was not ; because, if the plaintiff's account is true, there was evidence of a conversion,— he demanded the goods, and could not get them. But, I think, if the jury acted upon that, they acted upon erroneous evidence, and that they ought to have acted on the evidence of the defendant ; and, therefore, if my learned brothers had taken the same view of the evidence as I do, I should have thought a new trial ought to have been granted. But I protest against the notion that, because the judge who tried the cause says he is dissatisfied with the verdict, therefore a new trial should be granted. That ought not to be unless there are reasonable grounds for that dissatisfaction. Inasmuch as I have not been able to persuade my brothers that my grounds are reasonable, I think that they are right in discharging the rule. But I confess I think the verdict was against the evidence. I cannot say there was not evidence to go to the jury of a conversion of the goods, but I think the verdict was against the evidence. It certainly is not every detention of goods (although there is no right to detain them) that is a conversion, in my judgment at all events. Parke, B., in *Clark v. Chamberlain*,<sup>1</sup> said : “ If, instead of insisting upon salvage being paid, the defendant had said, ‘ I do not know whether salvage is due or not ; I shall keep them until that is ascertained,’ he would not have been guilty of a conversion.” In such cases, it would be monstrous to hold that a man had not a right to make reasonable inquiries. It cannot be that, if I pick up a watch in the street, and another person says, “ that is mine,” I am bound at once to deliver it up. I may say, “ It may be, but I will not give it to you before you tell me the name of the maker ;” and, if he thereupon walked away, it cannot be that he would have a right of action against me simply because I exercised a sound discretion. If such were the law, I should be sorry for it ; but I do not believe it is. The result is, you must in all cases look to see, not whether there has been what may be called a withholding of the property, but a withholding of it in such a way as that it may be said to be a conversion to a man's own use. I confess that there are some cases of a simple wrongful withholding, which may, according to the construction put upon that word, be called a conversion to a man's own use ; because, what matters it, to one who may be the owner of the goods, how or why he is deprived of them ? If a person detains a sheep belonging to me, what matters it to me whether he does so because he means to eat it, and does eventually eat it, or makes any other use of it. He has claimed a dominion over it inconsistent with mine. Suppose a man detains a picture for the pleasure of looking at it, and in order that it may form one of the ornaments of his dining-

<sup>1</sup> 2 M. & W. 78.

room, and does nothing to it but let it hang there : that is, to all intents and purposes, a conversion, according to law and good sense.

Now, in the present case, the defendant got possession of the billiard table, not wrongfully, because it was let on hire to a person who had lawful possession of it, and who might hand it over to the defendant without the defendant being a trespasser or wrong-doer therein. There was no suggestion that he got possession of it wrongfully ; but, having got possession of it lawfully, and never having removed it from the place where it was originally placed, and, in truth, having nothing more than what might be called nominal possession of it, the plaintiff comes and says, "The billiard table is mine, give it to me." The defendant says, "Show me how it is yours ; bring the contract of hiring." The contract of hiring is brought ; the defendant sees a writing on the back of it, which tends to show it was a sale ; and then asks for a copy, in order that he may take advice upon it ; the plaintiff, instead of doing as he properly might have done according to my view, says : "I shall not ; the table is mine ; you may give it to me or not ; but I shall treat it as a refusal." It turns out that he himself put the true color on the transaction, by sending a formal notice, and going the next morning for the billiard table, not treating it as an absolute refusal, but saying, "I will come and take it away with the proper means for doing so." The next morning, when he did come, it unfortunately happened that the defendant had given up the nominal possession ; and the person who had the actual custody had locked up the room, and the plaintiff could not get the table ; he went away, and five or six days afterwards the table was distrained for rent. It seems to me the more reasonable view of the case that this was not a conversion of the table to the defendant's own use. An attempt was made by my brother Martin to render this word "conversion" intelligible. But it ought to be borne in mind that in the forms of pleading given in the appendix to the Common-law Procedure Act of 1852 (the 15 & 16 Vict. c. 76), this is the form of the count in trover : "That the defendant converted to his own use, or wrongfully deprived the plaintiff of the use and possession of the plaintiff's goods, that is to say," &c. So that the legislature has put a meaning on the word "conversion." If the complaint had been that the defendant wrongfully deprived the plaintiff of the use and possession of his goods, the answer might well be, "I did not continue to detain them ; you might have had them, but you would not wait. If I am to be considered as having wrongfully detained them, though you went away and sent for them the next morning, your damages are a farthing." Instead of which, by the use of the word "conversion," the defendant is made liable for the value of the billiard table, which he cannot recover from anybody else. There-













fore, on consideration of all the facts, had I been one of the jury, I should have found that there was not an assertion of dominion inconsistent with the title of the plaintiff; that the whole affair was matter of discussion up to the time when the plaintiff was informed the goods were at his service; and that, so far as the defendant was concerned, there clearly was no conversion. For these reasons I think that the verdict was against the evidence; but, in so saying, I desire to add that in my opinion it is not merely because the judge who tried the cause comes to a different conclusion from the jury upon the facts, that a new trial should be granted; but that where it appears to the court that the view taken by the judge is wrong he should be set right, as on the present occasion, by being overruled. *Rule discharged.*

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### FOTHERGILL v. LOVEGROVE.

AT NISI PRIUS, CORAM KEATING, J., TRINITY TERM, 1860.

[*Reported in 2 Foster & Finlason, 132.*]

TROVER and detainue. Pleas: Not guilty, *non detinet*, and not possessed.

*Keane* for the plaintiff. *Petersdorff*, Serjt., for the defendant.

The plaintiff had lodged in a house of the defendants, kept by a female housekeeper for him. Having resolved to give up letting lodgings and to eject the housekeeper, she resisted, and had recourse to the plaintiff, who supported her in her resistance. Thereupon the defendant expelled her and the plaintiff, and proceeded to sell the furniture, which was removed by an auctioneer. Among the furniture thus removed were some articles belonging to the plaintiff, who claimed them, and having pointed them out, they were struck out of the catalogue; but in point of fact they had never been returned to the plaintiff, although he had repeatedly demanded them, and they remained at the auctioneer's.

For the defence, it was not denied that the articles were the plaintiff's, but it was contended that there had been no conversion by the defendant.

It was replied, on the part of the plaintiff, that it was for the defendant to return the articles, having wrongfully removed them, and that the proper course for him to take, after action brought, was to have taken out a summons to stay proceedings upon delivery of the goods, with some trifling sum for damage.

KEATING, J. (to the jury). Did the defendant detain, or cause to be

detained, the goods so as to deprive the plaintiff of them? If he did not intend to do so, why did he not return them? The proper course, even after action, would have been to take out a summons to stay it upon delivery of the goods.<sup>1</sup>

*Verdict for the plaintiff.*<sup>2</sup>

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## PILLOT v. WILKINSON.

IN THE EXCHEQUER, MAY 7, 1863.

[*Reported in 2 Hurlstone & Coltman, 72.*]

IN THE EXCHEQUER CHAMBER, JUNE 20, 1864.

[*Reported in 3 Hurlstone & Coltman, 345.*]

**TROVER.** For that the defendant converted and wrongfully deprived the plaintiff of the use and possession of his goods, that is to say, forty-nine cases of champagne, whereby the plaintiff was prevented from selling the same.

Pleas: first, not guilty; secondly, a denial that the goods were the plaintiff's, as alleged. Issues thereon.

This action was tried before Pollock, C. B., at the London sittings after last Michaelmas term, when the following facts appeared: The defendant was a warehouseman and wharfinger, and the cases of wine which formed the subject of the action had been deposited by Messrs. Bennett & Co., at his warehouse. A warrant for the wine, in the ordinary form, was given to Messrs. Bennett & Co., deliverable to them or their order by indorsement thereon, which was signed by Grueber the warehouse-manager, and Oram, a clerk in the employ of the defendant. The warrant was subsequently indorsed by Bennett & Co. to Henry & Co., who on the 5th of July sold the wine to the plaintiff, received payment for it, and delivered to the plaintiff the warrant generally indorsed. The plaintiff sent to the defendant's wharf on the 7th of July, and again on the 14th, for samples of the wine. The warrant was upon each occasion produced at the wharf; and, on its production, the clerk Oram gave samples, according to the usual practice, and indorsed upon the warrant a memorandum of the number of bottles withdrawn, to which he subscribed his initials. The evidence was conflicting upon the question whether a sampling order, signed by a clerk of the plaintiff, had been sent along with the

<sup>1</sup> Peacock v. Nicholls, 8 D. P. C. 367.

<sup>2</sup> See Cox v. Cook, 14 All. 165; Cargill v. Webb, 10 N. H. 199; Durell v. Mosher, 8 Johns. 445; Mitchell v. Williams, 4 Hill, 13. — ED.









warrant. It did not appear, however, that the defendant, or any of his clerks, were in fact aware either that the wine had been sold to the plaintiff, or that he was the holder of the warrant.

On the 22d of July, the following notice of attachment, issued the same day out of the Lord Mayor's Court, was served at the defendant's wharf:—

“22d day of July, 1862.

“To Mr. THOMAS WILKINSON :

“Take notice, that by virtue of an action entered in the Lord Mayor's Court, London, on the 22d day of July, 1862, against John Henry, trading under the name, style, or firm of J. Henry & Co., defendant, at the suit of Richard MacHenry, plaintiff, in a plea of debt upon demand of £50, I do attach all such moneys, goods, and effects as you now have, or which hereafter shall come into your hands or custody, of the said defendant, to answer the said plaintiff in the plea aforesaid, and that you are not to part with such moneys, goods, or effects, without license of the said court.”

“(Signed) SERJEANT AT MACE.

“Lord Mayor's Court Office.”

The notice of attachment was served by the Deputy Serjeant at Mace. The clerk to the attorney of the plaintiff in the Mayor's Court accompanied the Deputy Serjeant at Mace, and indorsed upon the back of the notice of attachment, before it was served, the particulars of the goods which form the subject of the present action, and the attention of the manager Grueber was directed to the indorsement.

Another notice of attachment, issued on the 16th from the Lord Mayor's Court against the goods of the same defendant in an action at the suit of one Aaron, was also served at the same time, but no particulars were indorsed upon it.

On the 24th of July, the plaintiff and his attorney called at the defendant's wharf, and saw the manager Grueber, to whom they produced the warrant, and explained that the plaintiff had purchased the wine, which he had come to demand. Grueber informed them that the wine was stopped on account of an attachment, but, upon searching for it, he was unable to find it, or to tell them against whom it had issued. He stated, however, that Mr. Wilkinson had gone to Lloyd's, and had probably taken the papers with him. The plaintiff's attorney then told him that the plaintiff had already lost one customer for the wine, and if he did not have it that day, it would be a loss. Grueber offered to accompany them to Lloyd's. They went there, but found that the defendant had left and gone home. On the same day the plaintiff's attorney wrote to the defendant as follows:—



"1 Circus Place, Finsbury Circus, E. C

"THOMAS WILKINSON, Esq.,

"24 July, 1862.

"Botolph Wharf, Lower Thames Street.

"Sir, — We are instructed by Mr. Pillot, the holder of warrant No. 7115, for forty-nine cases of wine, to request the immediate delivery of such cases of wine, and to apply to you for compensation for the loss he has sustained by your retaining the same. Our instructions are to adopt immediate proceedings, and we shall therefore feel obliged by your communicating with us by eleven o'clock to-morrow morning, so that, if satisfactory, our further intervention in the matter may become unnecessary. Should you still decline to deliver the goods, please send us the name of your solicitor, to whom we may send process.

"We are, Sir, &c.,

"DIGBY & SHARP."

On the morning of the 25th, but at what exact time did not appear, Grueber, having seen the defendant in the interval, called upon the plaintiff's attorney, and told him that the matter required consideration, and the defendant would consult his attorney.

The plaintiff's attorney received the same day the following letter from the defendants' attorney: —

"Sussex Chambers, Duke Street, St. James's.

"July 25th, 1862.

"Gentlemen, — Mr. Wilkinson, of Botolph Wharf, has sent us your letter of yesterday's date with instructions to communicate with you respecting it. The matter appears complicated, and we are not yet fully acquainted with the circumstances. We trust you will allow time for inquiry, as Mr. Wilkinson's only desire is to do what is right.

"We are, Gentlemen, &c.,

"F. MILLER & SON."

The writ had been issued at twelve o'clock the same day before this letter was received.

The plaintiff had lost a customer by the detention of the wine.

On the 28th of July a *scire facias* was issued from the Lord Mayor's Court in the action of MacHenry v. Henry, calling on Mr. Wilkinson, the present defendant, to show cause why the plaintiff in the Lord Mayor's Court should not have judgment against him for the appraisement of the goods therein described, theretofore attached in his hands as the goods and chattels of J. Henry, trading under the name, style, or firm of J. Henry & Co. The goods described in the body of the *scire facias* were the cases of wine forming the subject of the present action. The *scire facias* was served on the 31st, but it did not appear









that any further proceedings had been taken in the attachment. No step appeared to have been taken in the other attachment subsequent to the service of the notice of attachment. The goods had since remained in the possession of the defendant, who had never made any offer to give them up.

A verdict was entered, under his Lordship's direction, for the plaintiff, leave being reserved to move to enter the verdict for the defendant; the court to have power to draw inferences of fact.

*Montague Smith*, in last Hilary term, obtained a rule *nisi* accordingly, upon the ground that the goods were subject to an attachment in the Mayor's Court, and were *in custodia legis*, and that there was no conversion by the defendant under the circumstances proved.

*Bovill* and *Prentice* showed cause. The goods were never in the custody of the law. The notice of attachment could only affect the interest of the defendant in the Mayor's Court. *Smith v. Goss*.<sup>1</sup> But his interest had ceased by the transfer to the plaintiff before the notice issued. The goods remained, notwithstanding the notice, in the possession and under the control of the defendant. *Mallalieu v. Laugher*. No custom was proved to attach specific goods. The terms in which the notice is couched show that it has no such object. It purports merely to be a notice of attachment of "all such moneys, goods, and effects, as the garnishee now hath, or which shall hereafter come into his hands or custody, of the said defendant." The memorandum indorsed by the attorney's clerk cannot alter the effect of the attachment. But, further, it is clear that an attachment cannot be pleaded in bar to an action for the recovery of the property attached, until judgment has been obtained in the attachment, and execution thereon executed. *Brandon on Foreign Attachments*, p. 139. The defendant's right course was to appear in the Mayor's Court, and plead *nil habet*. On behalf of the defendant, the case of *Verrall v. Robinson*<sup>2</sup> will be relied on. That case may, perhaps, be supported on the ground that the facts there proved did not establish a conversion; but the opinion expressed in the judgment that the property attached was *in custodia legis*, is, it is submitted, without foundation. The facts of the case are, moreover, distinguishable.

Secondly, the facts here establish a conversion. The warrant gave notice to the defendant, that the defendant in the Mayor's Court had parted with his property in the goods, and to that warrant the defendant attorned. A wharfinger detains goods, when demanded by the true owner, at his peril. *Wilson v. Anderton*.<sup>3</sup> The refusal to deliver on the ground of the attachment was clearly a wrongful act.

<sup>1</sup> 1 Camp. 282.

<sup>2</sup> 2 C., M. & R. 495.

<sup>3</sup> 1 B. & Adol. 450.

*Montague Smith* and *Freeman*, in support of the rule. First, as to custody of the law. If the ground of the judgment in *Verrall v. Robinson*<sup>1</sup> can be supported, that case is decisive. The process in the Mayor's Court is directed against specific goods. The particulars of the goods, though merely indorsed on the notice of attachment, are specified in the body of the *scire facias*.

But the main point is, that upon the facts proved there was no conversion. The defendant had no notice that the plaintiff was the owner of the goods. The circumstances under which the samples were delivered did not constitute an attornment. The refusal to deliver was not absolute, but qualified in such a way as to afford no evidence of conversion. *Clark v. Chamberlain*.<sup>2</sup> It was a mere request of time for inquiry. A *bona fide* hesitation on the part of the defendant was reasonable. *Gunton v. Nurse*; <sup>3</sup> *Alexander v. Southey*. In *Vaughan v. Watt*, on a similar state of facts, Parke, B., said: "It was a question for the jury, whether the defendant meant to apply the goods to his own use, or assert the title of a third party to them, or whether he only meant to keep them in order to ascertain the title to them, and clear up the doubts he then entertained on the subject, and whether a reasonable time for doing so had not elapsed, without which it would not be a conversion. It ought, therefore, to have been left to the jury, whether the defendant had a *bona fide* doubt as to the title to the goods, and if so, whether a reasonable time for clearing up that doubt had elapsed." The court will infer that a *bona fide* doubt here existed in the mind of the defendant. In *Verrall v. Robinson*,<sup>1</sup> the refusal to deliver up a chaise to the owner on the ground of an attachment from the Sheriffs' Court was held to be no conversion, although the defendant in the Sheriffs' Court, who had hired the chaise and placed it at livery with the defendant, was present when the plaintiff demanded it, and admitted the plaintiff's title. In *Burroughes v. Bayne*, Channell, B., in his judgment, expressly guards himself against the supposition that every detention is a conversion. No claim inconsistent with the plaintiff's title was set up by the defendant either in himself or in any other person. They also referred to *Com. Dig., Attachment, A.* *Cur. adv. vult.*

The learned judges having differed in opinion, the following judgments were now delivered:—

BRAMWELL, B., said: I am of opinion that this rule should be made absolute, on the ground that there was no evidence of a conversion. The facts are shortly these: Certain goods, which belonged to the plaintiff, were lying in the warehouse of the defendant. The plaintiff,

<sup>1</sup> 2 C., M. & R. 495.<sup>2</sup> 2 M. & W. 78.<sup>3</sup> 2 B. & B. 447.











on applying for them there, was referred to the defendant's warehouseman, who told him that, in consequence of a foreign attachment, there was a difficulty, and that he did not know whether he ought to deliver up the goods. He proposed, however, that they should go to Lloyd's in search of Mr. Wilkinson, the defendant. They accordingly went to Lloyd's, but when they got there Mr. Wilkinson had gone home, and in consequence nothing was done. The plaintiff's attorney wrote the same day to the defendant, demanding possession of the goods by eleven o'clock the next day. The defendant's attorney replied the next day, stating that there was a question about a foreign attachment, and asking for time to make inquiries, and ascertain the actual facts. But before this letter was received, the writ in this action was issued.

The facts as to the foreign attachment are as follows: An officer from the Lord Mayor's Court came to the defendant's warehouse, and there produced a notice of attachment directed to the defendant, commanding him to detain the goods, not of the plaintiff, but of some third person, whom it specified. The person who served the process informed the defendant that it related to certain goods which he described, and which are the goods forming the subject of the present action.

Now, I am clearly of opinion that there was nothing in the mode in which this process was served, to constitute a defence to the present action. It has never yet been claimed as part of the custom of foreign attachment, that process directed to A., informing him that B.'s goods are attached, will justify A. in detaining goods belonging to C., merely because the server of the process tells him that those particular goods form the subject of the attachment. The only color for such a contention is to be found in the language of Lord Abinger, and Mr. Baron Alderson, in the case of *Verrall v. Robinson*,<sup>1</sup> who are there reported to have said that the goods were in "the custody of the law," and that, consequently, the defendant was justified in not delivering them up. The expression so used was, I think, inaccurate, but the decision was perfectly correct. The defendant was justified in taking time for consideration, and to obtain advice. But neither in that case, nor the present, was there any actual custody of the law. The officer did not here remain in possession; he merely served an attachment against the goods of one person, and stated that it attached goods which belonged to another.

I am, however, of opinion that the rule should be absolute, on the ground that there was no evidence of a "conversion." This word, when used in its natural sense, is open to no objection. Thus, for instance, where the defendant either drinks the plaintiff's wine, or

<sup>1</sup> 2 C., M. & R. 495.

burns his wood, or fires off his gun, or even detains a picture belonging to the plaintiff, and hangs it up in his drawing-room to enjoy the pleasure of looking at it; there is, in such cases, a conversion to the defendant's use. But, unfortunately, the meaning of this word has been extended, from its natural signification, to acts which are in no sense an actual conversion. Now, where this is the case, it invariably causes great difficulty in administering the law, and is very likely to lead — as in this form of action it has led — to serious injustice. Still, if on the authority of decided cases the facts of this case established a conversion, I should feel bound to defer to their authority. They are, however, diametrically opposed to any such view. The defendant never refused to give up these goods. He did not assert any title or right to detain them in himself, or in any other person; nor did he deny they were the plaintiff's. All that took place was, that the defendant's clerk said he was in some difficulty about the matter, and proposed they should go and consult the defendant. They were unable to find the defendant at the time, and the next day the defendant's attorney wrote to the plaintiff's attorney, asking him not to be precipitate, but to allow time to make some inquiry into the circumstances. If the plaintiff had refused to give any time, and had insisted on a distinct answer, the defendant might very probably have surrendered the goods. There was, in fact, no conversion in any sense of the word, neither from the plaintiff nor to the defendant. But, notwithstanding this, the defendant will, in this form of action, be liable for the full value of the goods. In my judgment there is no evidence of a conversion, and this rule should be made absolute.

MARTIN, B., said: In this case I think there was evidence to go to the jury of a "conversion." I retain the opinion which I expressed in *Burroughes v. Bayne*, where, a similar question having arisen, I stated what in my opinion was the meaning which the law has assigned to this word. My brother Channell also there expressed a similar opinion. In my judgment, where one person detains from another goods, which he either actually knows or has the means of knowing, and which, by instituting proper inquiries, he might have ascertained to be that person's property, that detention the law deems a "conversion." The term may not be a strictly appropriate one, but it was used in this sense in the time of Lord Holt, who says, "The very denial of goods to him that hath a right to demand them, is an actual conversion, and not only evidence of it; for what is a conversion but the assuming upon one's self the property and right of disposing of another's goods? And whoever detains another man's goods from him without cause takes upon himself the right of disposing of them." The term "conversion" has, in truth, a technical and conventional











meaning, which was originally given to it in order to make the action of trover applicable to what was more properly the subject of an action of detinue, and by this means prevent the defendant from availing himself of the right of waging his law, to which he was entitled in the latter form of action. By long practice it has been established that where one person withholds from another his goods without lawful reason or excuse, the action of trover lies. To that practice I think it better to adhere, than enter into an inquiry as to what the strictly accurate meaning of the word "conversion" is.

POLLOCK, C. B. I entirely agree with the opinion expressed by my brother Martin. The facts are shortly these: The plaintiff was the buyer of some champagne, which was in the custody of the defendant, who was a wharfinger. Having bought the champagne and obtained a warrant for it, the plaintiff sent his clerk with the warrant to the defendant's wharf to obtain a sample of the wine. The defendant attorned to the warrant and gave a sample; and subsequently he gave another. He had thus ample means of knowing that the plaintiff had bought the champagne, had taken samples of it, and was entitled to have the bulk when he demanded it. When, however, the plaintiff demanded the bulk, he was informed by the defendant that a foreign attachment had issued from the Court of the Lord Mayor against this champagne, and, when he urged that the defendant knew it to be his property, the defendant told him, in effect, that he would not give it up, and that he required time for consideration on account of this process.

Now, the law has been long established, that when a man knows or has the means of knowing that goods are the property of another, and declines to give them up, he is liable in an action of trover for the conversion. Then the plaintiff also complains that the defendant wrongfully deprived him of the use of these goods. Now, that the defendant deprived him of the use of the goods is undoubted. Did he do so wrongfully? Certainly; for when the plaintiff went with the warrant and demanded his goods, the defendant would not give them up. The plaintiff is therefore, in my opinion, entitled to recover. I regret that my brother Bramwell is of a different opinion, but, as the majority of the court are in favor of the plaintiff, the rule must be discharged.

BRAMWELL, B., added: If the view which I take of the facts had coincided with that of the Lord Chief Baron, I might perhaps have been of the same opinion.

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This was an appeal against the decision of the Court of Exchequer in discharging a rule to enter the verdict for the defendant, pursuant

to leave reserved at the trial. The pleadings and facts fully appear in the report of the case in the court below. 2 H. & C. 72.

*Montague Smith* (*H. Matthews* with him) argued for the defendant.<sup>1</sup> The argument was, in substance, the same as in the court below. The following additional authorities were cited: *Catterall v. Kenyon*;<sup>2</sup> *Brandon on Foreign Attachment*, p. 10.

*Prentice* appeared for the plaintiff, but was not called upon to argue.

WILLIAMS, J. We are all of opinion that the judgment of the Court of Exchequer should be affirmed. The points for our consideration arise in this way: At the trial the defendant's counsel objected that the wine was *in custodia legis* by the attachment, and that under the circumstances there was no proof of conversion. The jury, under the direction of the learned judge, found a verdict for the plaintiff; no question being left to them. The points are, first, whether the fact of an attachment having issued is of itself sufficient to prevent there being a conversion; secondly, if it is not of itself sufficient, whether that, with other circumstances, affords evidence of a conversion, — not a mere *scintilla*, but evidence on which the jury might find one way or the other. We think there was some evidence for the jury.

Upon the first point we were pressed with the case of *Verrall v. Robinson*.<sup>3</sup> There, goods having been attached by process out of the Sheriffs' Court, London, the Court of Exchequer considered that they were *in custodia legis*, and that prevented the defendant from giving them up. That case was adverted to in *Catterall v. Kenyon*,<sup>4</sup> where expressions are used which create some doubt whether the opinion of the court in *Verrall v. Robinson* was correct. According to the report of *Catterall v. Kenyon*,<sup>5</sup> Lord Denman said with reference to *Verrall v. Robinson*: "The judges there considered the chattel, the subject of the action, to have been in the custody of the law by force of a specific attachment of it, and that the defendant had no power to give it up."

There is therefore a distinction between *Verrall v. Robinson* and the present case. There, if the officer had actually got the goods in his possession, that prevented the defendant from being guilty of a conversion, because he could not give them up without the risk of coming into collision with the officer, and causing a breach of the peace. Here there was no seizure of the particular goods by the officer, and there was nothing to prevent the defendant from giving them up. All

<sup>1</sup> Before Williams, J., Crompton, J., Willes, J., Byles, J., Blackburn, J., and Shee, J.

<sup>2</sup> 3 Q. B. 810.

<sup>3</sup> 2 C., M. & R. 495.

<sup>4</sup> 3 Q. B. 810; s. c. 2 Gale & Dav. 545.

<sup>5</sup> In 2 Gale & Dav. p. 545.









that appears is that notice was given of a general attachment of all goods belonging to Henry & Co. in the hands of the defendant. It seems to us, therefore, that *Verrall v. Robinson* does not govern this case; and, according to the case of *Catterall v. Kenyon*, the fact of the goods being attached is a circumstance to be considered by the jury in forming their conclusion as to whether there has been a conversion.

Then, looking at all the circumstances, was there any evidence for the jury of a conversion? We think the law is correctly laid down in *Vaughan v. Watt*, by Parke, B., who said: "It ought therefore to have been left to the jury, whether the defendant had a *bona fide* doubt as to the title to the goods, and if so, whether a reasonable time for clearing up that doubt had elapsed." Here, assuming the defendant entertained a *bona fide* doubt as to whether the goods belonged to the plaintiff, the question remains whether a reasonable time for clearing up that doubt had elapsed. The same view of the law was taken by the Court of Common Pleas in *Towne v. Lewis*. The marginal note to that case is calculated to mislead. The statement, "this is not evidence of a conversion," does not accord with the report, because Wilde, C. J., left it to the jury to say whether, when the demand was made, the defendant meant to dispute the plaintiff's right to the bill, or whether he really meant to send it to him when he could obtain it. When the case was before the court *in banc*, Wilde, C. J., said: "No doubt the conduct of the defendant was evidence whence the jury might infer whether or not he had been guilty of a conversion." It seems to me that the evidence was properly submitted to the jury, and that they found a correct verdict. As observed by Coltman, J., "there was nothing more than evidence from which the jury might, if they pleased, have found a conversion, if they had been satisfied that there had been wilful and unreasonable delay on the defendant's part in complying with the plaintiff's demand."

The law being established by the authorities which we have cited, it remains to apply it to the present case. The defendant is not in the position of an ordinary person; he is a wharfinger, and bound to act with promptitude in his business, otherwise he may do great injury to the property of those who deposit goods at his wharf; and that is a circumstance which the jury would be entitled to take into consideration. Certainly a very short time elapsed between the attachment and the commencement of the action; but a considerable time had passed since the defendant became aware that Henry & Co. had parted with all their interest in the goods; and any reasonable man would have at once inquired whether the plaintiff's claim was valid or not. It was a question for the jury not only whether the



defendant entertained a *bona fide* doubt as to the plaintiff's title to the goods, but also whether a reasonable time had elapsed for clearing up that doubt, and if the jury were satisfied that there was unreasonable delay on the part of the defendant, they would be warranted in finding a conversion. Without giving any opinion whether the verdict is satisfactory, it is sufficient to say that there was evidence of a conversion proper to be admitted to the jury.

The other judges concurred.

*Judgment affirmed.*<sup>1</sup>

## HEUGH v. THE LONDON AND NORTH-WESTERN RAILWAY COMPANY.

IN THE EXCHEQUER, JANUARY 12, 1870.

[*Reported in Law Reports, 5 Exchequer, 51.*]

THIS was an action brought by the consignors of goods by the defendants' line to recover damages from the defendants for delivering the goods to a person who obtained the delivery by fraud, after the goods had been forwarded to the consignees' address and there refused.<sup>2</sup>

The cause was tried before Kelly, C.B., at the sittings for London after Trinity term, 1869. It appeared that the Southwark India Rubber Company had formerly had dealings with the London house of the plaintiffs, but had ceased to carry on business in August, 1866, and their premises were left in charge of a Mr. and Mrs. Tyler.

On the 30th of July, 1867, an order for goods was received by the plaintiffs, purporting to come from the Southwark India Rubber Company, but which had in fact been sent by G. F. Nurse, a person formerly in their employment as traveller.

In pursuance of this supposed order, the plaintiffs, on the 10th of August, despatched one bale of cotton duck by the defendants' line, consigned to the company at their old place of business. The bale arrived on the 12th of August, and was forwarded to the company's premises; but Mrs. Tyler refused to take it in.

On the 13th Nurse wrote to the defendants a letter signed by him for the company, stating that instructions would be given for delivery of the goods.

On the 14th the defendants, in accordance with their usual practice, addressed to the company an advice note in the following form:—

<sup>1</sup> See *Leighton v. Shapley*, 8 N. H. 359; *Corey v. Bright*, 58 Penn. 70.—Ed.

<sup>2</sup> The declaration contained seven counts; seventh count, trover for the bales. Plea: Not guilty.—Ed.









“Camden Station, Aug. 14, 1867.

“Advice of goods. Messrs. The India Rubber Company.

“The undermentioned goods, consigned to you, having arrived at this station, I will thank you to instruct our agents, Messrs. Pickford & Co., as to their removal hence as soon as possible, as they remain here to your order, and are now held by the company, not as common carriers, but as warehousemen, and at owner’s sole risk of loss or damage by deterioration or fire, and subject to the usual warehouse charges in addition to the charges now advised. When you send for the goods please send this note.”

At the foot of the note the particulars of the goods and the charges were stated.

On the 16th Nurse brought to the defendants’ station the advice note, and a letter signed by him for the company, requesting the defendants to deliver the goods to the bearer. On the production of these documents the defendants delivered the goods to Nurse.

A second bale similarly consigned by the plaintiffs arrived on the 16th of August, and was similarly forwarded and refused; and on the 21st Nurse brought to the defendants’ station a delivery order similar to the former one, and obtained this bale also. No advice note had been sent on this occasion by the defendants.

All the communications from Nurse, both to the plaintiffs and to the defendants, were written on the company’s paper, headed with their printed name and address.

The Lord Chief Baron, with the assent of the counsel for the plaintiffs, left to the jury in substance the question whether the defendants acted reasonably, properly, and without negligence in the course they took with respect to the goods, and in ultimately delivering them to Nurse. The jury answered this question in favor of the defendants, and a verdict was entered for them, with leave to the plaintiffs to move to enter a verdict for £122, if, on the facts proved, they were entitled to have the verdict entered for them.

*Prentice, Q. C.*, having, on the 5th of November, obtained a rule accordingly, and for a new trial, on the ground of misdirection and that the verdict was against evidence,

Jan. 12. *Giffard, Q. C.*, and *M Intyre* showed cause. The duty of the defendants as carriers was ended by their tender of the goods at the consignees’ address, and their duty afterwards could not be more than that of warehousemen or depositaries. *Great Western Ry. Co. v. Crouch*.<sup>1</sup> But the obligation of a depositary of goods is not like that of the carrier to insure the right delivery of the goods, but only to use reasonable care and diligence, and it is only for neglect of that care

<sup>1</sup> 3 H. & N. 183.

that he can be made answerable. *Green v. Hollingsworth*.<sup>1</sup> For theft in particular he is never answerable unless his own gross neglect has caused it: Story on Bailments, § 444;<sup>2</sup> and here it was by a theft that Nurse obtained delivery of the goods. Under such circumstances, therefore, it must be a question for the jury whether the defendant has been guilty of gross neglect: *Doorman v. Jenkins*;<sup>3</sup> and this issue the jury have found in favor of the company. In two cases, under circumstances in some degree resembling the present, *Stephenson v. Hart*<sup>4</sup> and *Duff v. Budd*,<sup>5</sup> the jury found a verdict adverse to the defendants, and the court refused to interfere with it; but those cases are no warrant for the position that, as a matter of law, a violation of duty was to be inferred; rather from the fact that the question was there left to the jury, the contrary may be inferred. Here, also, the question was rightly left to the jury, nor was any other question submitted at the trial on behalf of the plaintiffs. [They also contended that the verdict was not against the evidence.]

*Prentice, Q. C.*, and *Murray*, in support of the rule. After the tender of the goods the defendants were in the position of warehousemen, and though not, like carriers, answerable for theft, they were answerable for a misdelivery: Story on Bailments, §§ 450, 536-539, 543, 545 *b*; and misdelivery, not theft, is the character of the transaction in question, for they were voluntary and acting parties in the delivery to Nurse; but the theft spoken of is an act done without their knowledge or privity. The distinction between an act and a mere omission is drawn in *Willard v. Bridge*,<sup>6</sup> and in *Lichtenhein v. Boston & Providence Ry. Co.*<sup>7</sup>

[CHANNELL, B. It is admitted that the defendants were not carriers; but is it true that they were warehousemen? Did they not occupy an intermediate position, that of unwilling bailees? MARTIN, B. The law on this point appears to be correctly stated in *Redfield on Carriers*, § 25, which entirely agrees with what was laid down in this court and affirmed in the Exchequer Chamber in *Great Western Ry. Co. v. Crouch*.<sup>8</sup>]

In *Stephenson v. Hart*<sup>4</sup> and *Duff v. Budd*,<sup>5</sup> the defendants were in the same position as in the present case; and these cases, and the expressions used in them, are strongly in favor of the present plaintiffs. But here the plaintiffs' case stands on higher ground, for the defendants had by their notice claimed warehouse rent, and were therefore not gratuitous bailees, but were within the cases of *Cairns v. Robins*<sup>9</sup> and *White v. Humphrey*.<sup>10</sup>

[KELLY, C. B. In those cases a contract existed between the parties;

<sup>1</sup> 5 Dana, 173.

<sup>2</sup> See also *Giblin v. McMullen*, Law Rep. 2 P. C. 317.

<sup>3</sup> 2 A. & E. 256.

<sup>4</sup> 4 Bing. 476.

<sup>5</sup> 3 B. & B. 177.

<sup>6</sup> 4 Barb. 367.

<sup>7</sup> 11 Cush. 70

<sup>8</sup> 3 H. & N. 183.

<sup>9</sup> 8 M. & W. 258.

<sup>10</sup> 11 Q. B. 43.











but how could the defendants here become entitled to a rent merely because they claimed it by a note sent after the goods were in their possession, and which was not even addressed to the plaintiffs, and was never communicated to them?]

[They also contended that the verdict was against the evidence.]

KELLY, C. B. This rule must be discharged. The question is, whether, under the circumstances, the delivery to Nurse by the defendants amounted in law to a conversion, or whether the defendants were only bound to act, and did act, with reasonable care. On the arrival in London of the goods consigned by the plaintiffs to the Southwark India Rubber Company, the defendants, in strict accordance with their duty, sent the goods to the place to which they were addressed. The person in charge of the premises refused to take them in, and at that moment the question arose, what duty was imposed upon the defendants in relation to the goods? They could not deposit them on the pavement, and they were not permitted to bring them into the house; they were, therefore, under the necessity of taking them back to the station. Now it is their practice when goods are refused at the address to which they are consigned, to deposit the goods in safety, and to send an advice note to the consignees, informing them that the goods remain at their risk and charges, and requesting them to give instructions for their delivery, and on sending for them to produce the advice note. This course was adopted by the defendants on the present occasion; the advice note was sent, and a few days after it was brought to the defendants' premises by Nurse, a person formerly employed by the India Rubber Company, and the goods were, on his demand in the name of the company, delivered to him. A second bale of goods was delivered to him under similar circumstances.

The plaintiffs contend that this was a misdelivery on the part of the defendants amounting to a conversion; but no sufficient authority has been cited in support of this position. It is true that a misdelivery by a carrier has been held to amount to a conversion; but the defendants' character of carriers had ceased, and whatever character they filled it was not that. Their position has been not inaptly described as that of involuntary bailees; without their own default they found these goods in their hands under circumstances in which the character of carriers under which they received them had ceased. Did they, then, as such involuntary bailees, become subject to an absolute duty to deliver to the proper person, so as to be liable for a misdelivery, though without negligence? The only authorities in the courts of this country cited in support of that proposition are *Stephenson v. Hart*<sup>1</sup> and *Duff v. Budd*;<sup>2</sup> but in neither case was it held, or even contended, that the

<sup>1</sup> 4 Bing. 476.

<sup>2</sup> 3 B. & B. 177.

misdelivery amounted as a matter of law to a conversion; but in both cases it was admitted to be a question for the jury — and the question was, in fact, left to them — whether, under all the circumstances, the defendants had acted with reasonable care. It is plain, then, on the authority of those cases, that misdelivery under such circumstances is not, as a matter of law, a conversion, but that it is a question of fact for the jury whether the defendants have exercised reasonable and proper care and caution. The jury have answered this question in favor of the defendants, and they are therefore entitled to keep their verdict. I may add that it was from the plaintiffs' act in giving credit to Nurse that the whole difficulty arose, and that this was a matter which the jury were entitled to take into account in considering whether the defendants had discharged the duty cast upon them with respect to the delivery of the goods.

MARTIN, B. I am of the same opinion. Two objections are made by the plaintiffs. First, that there was a misdirection by the Lord Chief Baron; second, that the verdict was against evidence. With respect to the first (assuming that it is open to counsel to contend that there is misdirection when the judge puts to the jury the very question which he is asked to leave to them), I am of opinion that there was no misdirection. A fraudulent order for goods was sent to a firm at Manchester, purporting to come from a company which had, in fact, given no authority for the order, and the goods were forwarded by the defendants' line to be delivered accordingly. Under ordinary circumstances there would be no contract by the defendants with the consignors, but only with the consignees, for whom the consignors would be presumed to have acted as agents. But here, there being no such sale, the property remained in the plaintiffs, and the defendants' duty was to obey their orders. This the defendants did, or rather were ready and willing and offered to do, and they thus performed the duty that was laid upon them. But there was no one who could or would receive the goods, and the defendants were thus in the position — I know of no better term — of involuntary bailees. By reason of a mistake not made by them they found the goods on their hands. Now, as is laid down in the passage I have quoted (*Redfield on Carriers*, § 25), when the carrier accepts the goods he becomes an insurer; but when he has done all that he contracted to do, then his relation of carrier ceases, and a duty is, under such circumstances as the present, cast upon him of acting as a reasonable man. What, then, did the defendants do? They carry the goods back to their station and send an advice note to the consignees. Soon after Nurse comes, bringing the advice note, and claims the goods and obtains delivery. Upon my Lord's direction, which, even if it were without the sanction of plaintiffs' counsel I should hold











to be right, the jury have found that the course adopted by the defendants was reasonable and proper, and that verdict is approved of by my Lord who tried the cause, and is also in my own judgment right. It is impossible to suggest any substantial ground for imputing want of care to the defendants, who were misled by the same person who had misled the plaintiffs.

CHANNELL, B. I am of the same opinion. As to the correctness in fact of the verdict, I think it right; and it has the sanction of the Lord Chief Baron, who tried the cause. The only question is, whether the delivery to Nurse, under the circumstances, amounted in law to a conversion, for the plaintiffs' argument must go that length. Some American cases were cited in support of this proposition, but they fail to satisfy me that any such duty was cast upon the defendants as to produce this legal result, or that any duty was imposed upon them to do more than they have done. They acted as reasonable men, and were misled without any default of their own.<sup>1</sup>

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## FOWLER AND OTHERS v. HOLLINS AND OTHERS.

IN THE EXCHEQUER CHAMBER, JUNE 14, 1872.

[*Reported in Law Reports, 7 Queen's Bench, 616.*]

APPEAL from the decision of the Court of Queen's Bench, making a rule absolute to enter a verdict for the plaintiffs.

The action was in trover to recover thirteen bales of cotton. Pleas: Not guilty, and not possessed.

The cause was tried before Willes, J., at the Liverpool spring assizes, 1870.

1. The plaintiffs are merchants carrying on business at Liverpool, and the defendants are cotton brokers at that place.

2. Early in December, 1869, the plaintiffs instructed their brokers, Messrs. Rew & Freeman, to sell for them thirteen bales of cotton; and shortly before the 18th of December a person named Hill, a clerk in the service of H. K. Bayley, came to the brokers of the plaintiffs and offered to purchase the cotton. The plaintiffs' brokers, however, refused to sell, unless the name of a responsible person were given as purchaser. Hill thereupon stated that H. K. Bayley was buying as broker for Thomas Seddon, of Bolton.

3. The plaintiffs' brokers, having made inquiries as to Thomas Seddon, agreed to sell the thirteen bales of cotton to him.

<sup>1</sup> See *M'Kean v. M'Ivor*, L. R. 6 Ex. 36; *Aurentz v. Porter*, 56 Penn. 115; *A. & T. R. R. v. Kidd*, 35 Ala. 209. — ED

4. Accordingly, on the 18th of December, 1869, the plaintiffs' brokers forwarded to the plaintiffs a sold note "for thirteen bales American cotton, *ex* 'Minnesota,' at 12*d.* per lb. — buyer, Thomas Seddon, per H. K. Bayley — payment in cash within ten days less one and a half per cent discount." The plaintiffs' brokers also sent to Bayley a bought note addressed to "Thomas Seddon, per H. K. Bayley, for thirteen bales American cotton, *ex* 'Minnesota,' at 12*d.* per lb., subject to the rules and regulations of the Liverpool Cotton Brokers' Association. Payment in cash within ten days less one and a half per cent discount."

5. On the same day Bayley sent to plaintiffs' brokers a sampling and delivery order for the "thirteen bales cotton, *ex* 'Minnesota,' bought this day for Thos. Seddon, at 12*d.*"

6. Bayley accordingly obtained, on the same day, delivery of the goods, and they were removed to his warehouse.

7. H. K. Bayley had no authority from Thomas Seddon to buy for him, but the plaintiffs did not discover this until the time and in the manner mentioned in the 18th paragraph of this case.

8. On the 23d of December, H. K. Bayley saw the defendant, Francis Hollins, and showed him some samples of cotton, *ex* "Minnesota." F. Hollins offered to give 11¼*d.* per pound for the thirteen bales, and the defendant then stated that he would send in the name of his principal in the course of the day. He also bought in like manner, on the same day, other twenty-five bales of cotton from Bayley. Immediately after the agreement to buy, Bayley handed to the defendants the following memorandum: "We sell you 13 B/s. 11¼, 25 B/s. 11½. Cash to-day, per H. K. B. & Co."

9. The defendants proceeded to sample the cotton. For this purpose they sent to Bayley the following note: "Liverpool, 23d December, 1869. Please allow the bearer to sample thirteen bales cotton, *ex* 'Minnesota,' @ 11¼ per lb., bought this day." This note Bayley indorsed with the requisite authority to his warehousemen, and the defendants' servants at once sampled the cotton.

10. The defendants, on the morning of the 23d of December, had received a message from Micholls, Lucas, & Co., cotton spinners at Stockport, for whom the defendants were in the habit of purchasing cotton, stating that they were coming over to Liverpool on the 23d of December to purchase cotton through the defendants. The defendants had had no other communication with Micholls & Co. as to the buying for them on this day of this or any cotton.

11. The cotton which the defendants bought of H. K. Bayley was such cotton as the defendants were in the habit of buying for Micholls, Lucas, & Co., and at the time the defendant, F. Hollins, agreed to pur-









chase the cotton from Bayley, he intended to buy it as a broker, and intended it for Micholls & Co., believing that it was such cotton as they were coming to buy, and that it would suit them, and that on their arrival at Liverpool they would take it.

12. About half an hour after the defendants had agreed with Bayley, Mr. Micholls came to the defendants' office, and samples of the cotton having been obtained, he examined them to judge of the quality of the cotton; he inquired as to the quantity and price, and, being satisfied as to these, he agreed to take it.

13. The defendants have a large number of customers, and frequently, without any definite instructions, buy cotton which they, knowing their trade and requirements, believe will suit them, and, feeling satisfied, they will take it; but if it happens that a customer for whom they intended to buy such cotton will not take it, they trust to be able to place it with some other customer.

14. Later in the same day the defendants sent to Bayley a delivery order for the delivery to bearer of the "thirteen bales of cotton, *ex* 'Minnesota,' at 11½ per lb., bought for Micholls, Lucas, & Co." This order was crossed, "To Joseph Thompson, H. K. Bayley, per R. Hill," and indorsed, "Delivered the within thirteen bales, Joseph Thompson." This was the first document which mentioned Micholls, Lucas, & Co.'s names to H. K. Bayley. Bayley also sent in on the same day to the defendants an invoice addressed "Francis Hollins & Co.—Bought from H. K. Bayley thirteen bales of cotton, *ex* 'Caledonia,' at 11½ per lb., amounting to £244 19s. 8d."

15. This delivery order was taken to the warehouse of H. K. Bayley by one of the defendants' clerks, and thirteen bales of cotton were, under the supervision of the defendants' clerk, delivered by Bayley's warehouseman into the cart of a carter employed by the defendants. The cotton was conveyed in the cart to the railway station, whence it was forwarded to Micholls, Lucas, & Co.'s mill, at Stockport.

16. These thirteen bales were the thirteen bales obtained by H. K. Bayley from the plaintiffs as mentioned in par. 6.

17. The invoice price of the cotton, £244 19s. 8d., was paid by the defendants to H. K. Bayley, and the same sum, with £1 4s. 10d. added for the defendants' commission, and 6s. 6d. for portorage, was paid by Micholls, Lucas, & Co. to the defendants. The defendants' course of business is to charge their customers 6d. per bale for carterage or portorage. The carter carrying for the defendants on certain agreed terms,—the 6s. 6d. mentioned represents the 6d. per bale on the thirteen bales.

18. The plaintiffs not having been paid for the cotton in due time, their brokers applied to Thomas Seddon for a settlement, and were in-



formed by him, as the fact was, that he had never authorized H. K. Bayley to purchase cotton for him.

19. They thereupon made inquiries, and learned that the cotton had been sold and delivered by H. K. Bayley to the defendants. A demand (stating the fraudulent nature of Bayley's transaction) was made on the 10th of January, 1870, by the plaintiffs' attorneys on the defendants for the cotton.

20. This was the first intimation which the defendants received that the cotton was not, as they believed it to be, the property of Bayley. They replied to the demand of the plaintiffs' attorneys as follows: "The cotton was bought by one of our spinners, Messrs. Micholls, Lucas, & Co., for cash, and has been made into yarn long ago; and, as every thing is settled up, we regret we cannot render your clients any assistance."

Upon these facts, the learned judge left to the jury the questions, whether the thirteen bales were bought by the defendants as agents in the course of their business as brokers, and whether they dealt with the goods only as agents to their principals.

The jury found a verdict for the defendants; the learned judge reserved leave to the plaintiffs to move to enter the verdict for them for the value of the thirteen bales.

A rule was afterwards obtained pursuant to the leave reserved.<sup>1</sup>

The rule was argued on the 21st and 26th of November, 1871, and the court (Mellor, Lush, and Hannen, JJ.) made it absolute, on the ground that the defendants, in effect, bought as principals, and would have been liable to Bayley as vendees, and having dealt with the cotton as if the property were in them by assigning it to Micholls, Lucas, & Co., were liable to the plaintiffs for a conversion, on its turning out that no property had passed from the plaintiffs to Bayley. The case of *Greenway v. Fisher* did not apply, and the case was not distinguishable in principle from *Hardman v. Booth*.<sup>2</sup>

Feb. 14. *Holker*, Q. C. (*Herschell*, Q. C., with him), for the defend-

<sup>1</sup> The terms of the leave reserved did not appear in the statement of the case for the Court of Appeal; but it was reserved in writing and was handed to the court, and was as follows: If the defendants, having acted throughout honestly, in the ordinary course of business, having bought and paid for the cotton only as agents for Micholls, Lucas, & Co., and having dealt with the goods only as agents to forward them, were answerable for the value of the thirteen bales of cotton as having converted them to their own use. The defendants to be at liberty to argue, if necessary, that the sale by Bayley under the circumstances gave a good title to a *bona fide* purchaser for value without notice.

The rule was moved on three grounds: 1. That the verdict was against the evidence; 2. Misdirection; 3. On the point reserved. The court refused the rule on the first and second grounds.

<sup>2</sup> 1 H. & C. 803; 32 L. J. (Ex.) 105.









ants, contended, first, that the defendants, having purchased the goods in the name of undisclosed principals, Messrs. Micholls, who had afterwards ratified the contract, the property in the goods passed to them; and the action ought to have been against Messrs. Micholls. *Foster v. Bates*; <sup>1</sup> *Bird v. Brown*.<sup>2</sup> Secondly, that the defendants, having acted merely as brokers in negotiating the sale, their acts did not amount to a conversion. On this point, in addition to the cases mentioned in the judgment, they cited *Pillot v. Wilkinson*; *Heald v. Carey*; *Greenway v. Fisher*.

*Kay, Q. C. (C. Russell, Q. C., with him)*, for the plaintiffs, contended, first, that the defendants purchased the cotton from Bayley as principals, and not as agents. Secondly, assuming they purchased as agents, that the asportation of the cotton by the defendants, for their own use, or for the use of a third person, amounted to a conversion. *Bac. Abr. Trover (B)*; *Baldwin v. Cole*; *M'Combie v. Davies*; *Higsons v. Burton*; <sup>3</sup> *Hardman v. Booth*.<sup>4</sup> Thirdly, that every intermeddling with the property of another, with the intention to exercise dominion over it, was a conversion, and the acts of brokers, agents, or servants were not exemptions from this rule: *Story on Agency*, §§ 308, 309; *Perkins v. Smith*; *Cranch v. White*; <sup>5</sup> *Tinkler v. Poole*; *Hardman v. Booth*; <sup>6</sup> but that it is otherwise in the case of carriers and wharfingers. *Ross v. Johnson*; *Lee v. Bayes*.<sup>6</sup>

*Cur. adv. vult.*

June 14. The following judgments were delivered:—

BRETT, J. In this case the plaintiffs, merchants in Liverpool, sued the defendants, cotton brokers in the same place, in an action of trover to recover the value of thirteen bales of cotton. The cotton had, under the circumstances set forth in the case on appeal been, in 1869, fraudulently bought by one Hill, a clerk of Bayley, a cotton broker, from the plaintiffs' brokers, Messrs. Rew & Freeman. The defendants, in 1869, bought, under the circumstances further stated in the case, and without notice of any fraud, the same cotton from Bayley, and obtained his signature to a delivery order for it, and took delivery of it from Bayley's warehouse into the cart of a carter employed by them, and conveyed it in the cart to the railway station, whence it was forwarded to Messrs. Micholls, Lucas, & Co.'s mill at Stockport, where it was spun into yarn by them. In 1870, after the cotton had been so used by Messrs. Micholls, Lucas, & Co., the plaintiffs demanded the cotton from the defendants. The learned judge, Mr. Justice Willes, before whom the case was tried, left to the jury the questions, whether the thirteen bales were bought by the defendants as agents in the

<sup>1</sup> 12 M. & W. 226.

<sup>2</sup> 4 Ex. 786.

<sup>3</sup> 26 L. J. (Ex.) 342.

<sup>4</sup> 1 H. & C. 803; 32 L. J. (Ex.) 105.

<sup>5</sup> 1 Bing. N. C. 414.

<sup>6</sup> 18 C. B. 599; 25 L. J. (C. P.) 249.

course of their business as brokers, and whether they dealt with the goods only as agents to their principals. The jury found a verdict for the defendants. The learned judge reserved leave to the plaintiffs to enter a verdict for £244 19s. 8d., the value of the cotton, if the defendants having acted throughout honestly, in the ordinary course of business, having bought and paid for the cotton only as agents for Micholls, Lucas, & Co., and having dealt with the goods only as agents to forward them, were answerable for the value of the thirteen bales of cotton, as having converted them to their own use. The defendants to be at liberty to argue, if necessary, that the sale by Bayley, under the circumstances, gave a good title to a *bona fide* purchaser for value without notice. An application was made to the Court of Queen's Bench to set aside the verdict as being against evidence, and to enter the verdict for the plaintiffs in pursuance of the leave reserved. The rule to set aside the verdict was refused; but a rule to enter the verdict for the plaintiffs was granted, and afterwards made absolute.

According to the interpretation put upon the findings of the jury by the leave reserved, assented to by both parties, it must be taken, I think, that the defendants, in making the contract and paying the contract price, acted only as brokers and agents for Micholls, Lucas, & Co., and that, in obtaining the signature to the delivery order and in forwarding the goods to the railway station, they acted only as forwarding agents to forward goods to their principals. Upon the leave reserved, it appears to me that neither was the court below nor is this court at liberty to enter upon any other interpretation of the facts proved at the trial. If any other complexion is to be given to facts proved at a trial at *Nisi Prius* than that put upon them by the judge in the leave which he reserves, parties will not consent to that valuable mode of raising and determining questions of law. The question then is whether, if this interpretation be accepted, the defendants have been, in point of law, guilty of a conversion of the plaintiffs' goods so as to be liable in an action of trover. It seems necessary, in the first place, to consider and analyze the real import of the findings of the jury. They have first found, then, that the defendants acted only as brokers. It seems desirable, in order to appreciate that finding, to consider the mercantile characteristics and thereupon the legal duties and liabilities of such an agent. The true definition of a broker seems to be, that he is an agent employed to make bargains and contracts between other persons in matters of trade, commerce, or navigation. Properly speaking, a broker is a mere negotiator between the other parties. If the contract which the broker makes between the parties be a contract of purchase and sale, the property in the goods, even if they belong to the supposed seller, may or may not pass by the contract. The prop-











erty may pass by the contract at once, or may not pass until a subsequent appropriation of goods has been made by the seller and has been assented to by the buyer. Whatever may be the effect of the contract as between the principals, in either case no effect goes out of the broker. If he sign the contract, his signature has no effect as his; but only because it is in contemplation of law the signature of one or both of the principals: no effect passes out of the broker to change the property in the goods. The property changes either by a contract which is not his, or by an appropriation and assent, neither of which is his. In modern times, in England, the broker has undertaken a further duty with regard to the contract of purchase and sale of goods. If the goods be in existence, the broker frequently passes a delivery order to the vendor to be signed, and on its being signed, he passes it to the vendee. In so doing, he still does no more than act as a mere intervener between the principals. He himself, considered as only a broker, has no possession of the goods, no power, actual or legal, of determining the destination of the goods, no power or authority to determine whether the goods belong to buyer or seller or either; no powers, legal or actual, to determine whether the goods shall be delivered to the one or be kept by the other. He is throughout merely the negotiator between the parties. And, therefore, by the civil law, brokers "were not treated as ordinarily incurring any personal liability by their intervention, unless there was some fraud on their part." Story on Agency, § 30. And if all a broker has done be what I have hitherto described, I apprehend it to be clear that he would have incurred no personal liability to any one according to English law. He could not be sued by either party to the contract, for any breach of it. He could not sue any one in any action in which it was necessary to assert that he was the owner of the goods. He is dealing only with the making of a contract, which may or may not be fulfilled, and making himself the intermediary passer-on or carrier of a document, which may or may not be obeyed, without any liability thereby attaching to him towards either party to the contract. He is, so long as he acts only as a broker in the way described, claiming no property in or use of the goods, or even possession of them, either on his own behalf or on behalf of any one else. Obedience or disobedience to the contract, and its effect upon the goods, are matters entirely dependent upon the will and conduct of one or both of the principals, and in no way within his cognizance. Under such circumstances, and so far, it seems to me clear that a broker cannot be sued with effect by any one. If goods have been delivered under a contract so made and a delivery order so passed, still he has had no power, actual or legal, of control either as to the delivery or non-delivery, and probably no knowledge of the delivery, and he has

not had possession of the goods. It seems to me impossible to say that for such a delivery he could be held liable by a real owner of the goods as for a wrongful conversion to his, the broker's, own use. But then in some cases a broker, although acting as an agent for a principal, makes the contract of purchase and sale in his own name. In such case he may be sued by the party with whom he has made such contract for a non-fulfilment of it. But so also may his undisclosed principal. And although the agent may be liable upon the contract, yet I apprehend nothing passes to him by the contract. The goods do not become his. He could not hold them, even if they were delivered to him, as against his principal. He could not, as it seems to me, in the absence of any thing to give him a special property in them, maintain any action in which it was necessary to assert that he was the owner of the goods. The goods would be the property of his principal. And although two persons, it is said, may be liable on the same contract, each as sole contractor, yet it is impossible that two persons can each be the sole owner of the same goods; although the agent may be held liable as a contractor on the contract, he is still only an agent, and has acted only as an agent. He could not be sued, as it seems to me, merely because he had made the contract of purchase and sale in his own name with the vendor, — even though the contract should be in a form which passes property in goods by the contract itself, — by a third person, as if he, the broker, were the owner of the goods. As, for instance, if the goods were a nuisance, or were an obstruction, or, as it were, trespassing, he would successfully answer such an action by alleging that he was not the owner of the goods, and by proving that they were the goods of his principal, until then undisclosed. If he could not be sued for any other tort, merely on the ground that he had made the contract in his own name with the vendor, it seems to me that he cannot be successfully sued merely on that ground by the real owner of the goods, as for a wrongful conversion of the goods to his own use. It may be well here to notice that in the present case the broker, although he did not give the name of his principal at the time of the bargain, expressly reserved the right of naming his principal in the course of the day, and that he did so. It may be well said, therefore, that in this case he did disclose his principal. But however that may be, if all that the defendants had done in this case was to make the contract and pass the delivery order, I should have thought it clear that they would not have been guilty of a conversion of the goods in question. But the defendants in this case did more; they, through an agent of theirs, took actual possession of the goods and carried them from the warehouse to the railway station in order to forward them to Messrs. Micholls, Lucas, & Co. A question arises as to what











was the nature of that asportation. Such an act might have been done with an actual intention of depriving one person of his property in the goods and of vesting the property in them in the other; as, for instance, if the defendants had had notice of the plaintiffs' claim, and had passed the goods on to the principals in the contract after such notice. In such case they would clearly be guilty of a conversion. But the jury have found that they dealt with the goods only as agents for their principals. And the judge who tried the cause has, by the form of the leave reserved, fixed the meaning of that to be that the defendants acted only as agents to forward. That must mean, as it seems to me, that they forwarded the goods without any actual intention with regard to, or any consideration of, the property in the goods being in one person more than another. The real question in this case is, whether such a possession of the goods, and such an asportation, put any liability on the defendants different from their liabilities, if any, by reason of having, as brokers, made the contract and passed the delivery order. That question depends upon what is the legal definition of the term "conversion" in an action of trover. The leading authority is the note in Williams' Saunders, to the case of *Wilbraham v. Snow*.<sup>1</sup> As in all other questions arising upon the application of legal principles to facts, there are some cases about which there is no doubt. Where one, with intent to make them his own, actually takes as his own, or actually destroys or actually uses as a man uses his own, the goods of another, it is not difficult to determine that he has done an act intentionally inconsistent with the dominion of any one but himself as real owner of the goods, and has been guilty of a wrongful conversion of the goods. It is easy to understand how it was held that in such cases the innocence of the defendant, in the sense of his not knowing who the real owner was, or that the person from whom he immediately took the goods was not the real owner, was immaterial; the defendant has taken the goods with intent that they should be his own, or has used them as if they were his own. Such acts must necessarily be contrary to the rights of a real owner who has not authorized him so to take or so to use. So if one be in possession of goods under the belief that he has a right to maintain possession, and they be demanded of him and he absolutely refused to deliver them, he has intentionally exercised over them a dominion intentionally inconsistent with the alleged right of him in whose name they were demanded, and in such case it is not difficult to say that the defendant, if the demand was made on behalf of the real owner, has been guilty of a wrongful conversion. But it is where one has dealt with goods as if they were his own without having

<sup>1</sup> 2 Wms. Saund. 47 d.

had possession of them, or where one has taken goods into his possession, but not with intent that they should be his own, or without reference to their being the property of one person or of another, or having goods in his possession has not used them as his own, and where no demand has been made on him for a delivery of the goods to or on behalf of the real owner whilst they were in his, the defendant's, possession, that the real difficulties arise. As to the first, I think it may be rightly said that in no case can a man be guilty of a conversion who has not by himself or his agent had possession of the goods in dispute. A man might, I apprehend, be guilty of a conversion, though he had had possession only by his agent; as if he had authorized an agent to take goods for him, or to use or destroy them, and the agent had obeyed his commands;<sup>1</sup> but if the order had been given and had not been obeyed, I apprehend that the mere order would not be a conversion. So if one enters into a contract to sell, as if they were his own, the goods of another, whether the form of the contract be such as would assume to pass the property at once, or such as could only pass the property on a subsequent delivery, I apprehend that the mere fact of making such a contract is not a conversion.

These propositions seem to me to be assumed or decided in the first point decided in *Lancashire Wagon Co. v. Fitzhugh*.<sup>2</sup> The real difficulty is where the defendant has had the goods in his actual possession. It is clear that he is not in such case always liable for conversion, and equally clear that in some such cases he is liable. He is clearly not liable, though he has had actual possession of goods, if he has held them or has assumed to hold them for the real owner. He is clearly liable, as has been said, if he has taken the goods as his own, or has used them as if they were his own, or has, upon demand by or on behalf of the real owner, refused to give them up. The more material cases in the present case are those in which the defendant has been held not guilty of a conversion, although he has had actual possession of the goods, not as agent for the real owner, but as agent for others. These cases require careful attention. In *Bruen v. Roe*<sup>3</sup> the proposition is thus stated: "If in trover and conversion an actual taking of goods is given in evidence, that is sufficiently good without proving a demand and denial, as the taking of my cap from my head; for that is actual conversion; but when the thing comes by trover there ought to be an actual demand and refusal." The actual taking there described is a taking intentionally without or against the consent of the person in possession. The trover implies an actual possession, but is held to be insufficient to constitute a conversion, because con-

<sup>1</sup> See *Hilbery v. Hatton*, 2 H. & C. 822, acc. — Ed.

<sup>2</sup> 6 H. & N. 502.

<sup>3</sup> Sid. 264.









sistently with it the defendant may not be claiming any thing more than the mere custody of the goods. In *Ross v. Johnson*, the defendant, a wharfinger, had had actual possession of the plaintiff's goods without the authority of the plaintiff. But Lord Mansfield held that the mere fact of such a possession was not evidence of a conversion. "It is impossible," he said, "to make a distinction between a wharfinger and a common carrier. They both receive the goods upon a contract. Every case against a carrier is like the same case against a wharfinger. But in order to maintain trover there must be an injurious conversion." The phrase hardly seems to help; but the decision upon the facts seems to me to be, that a mere custody of goods without any intention as to the property in them is not a conversion.

In *Greenway v. Fisher*, one of the defendants was a packer, who in the regular discharge of his duty had, according to directions from persons wrongfully in possession of the plaintiff's goods, packed and shipped the goods. Lord Tenterden held that there was no conversion by such defendant, although he had had actual possession of the goods and had packed and shipped them. These were acts surely inconsistent in fact with the plaintiff's right of dominion. "On the part of Woodward" (one of the defendants), says Lord Tenterden, "reliance is placed, and I think properly, on the circumstance of his acting in the ordinary course of his business, and I am of opinion that the course of trade in this instance furnishes an exception to the general rule. The distinction between this case and that of a servant is, that here there is a public employment; and, as to a carrier, if, while he has the goods, there be a demand and a refusal, trover will lie; but while he is a mere conduit pipe in the ordinary course of trade, I think he is not liable." The terms of this judgment seem to me to be hardly satisfactory. The mere fact that the defendants' employment was a public one cannot be the reason. Almost every trade is a public employment. But the butcher who should kill and cut up the plaintiff's beast, or the spinner who should spin his cotton into yarn, would be guilty of a conversion, although the trade would be equally a public employment as that of a packer. The meaning of the expressions must be gathered from the facts of the case. It is that the known nature of the employment of a packer, like that of a carrier or wharfinger, known because it is public, shows that, although he has had actual possession of and has made an actual asportation of goods, yet his possession was only a custody, and his asportation was made without reference to or consideration of the question of whose property the goods were.

In *Fouldes v. Willoughby*, the defendant took the horses from the plaintiff, who was holding one of them by the bridle, against the will of the plaintiff, and put them on shore. The judge at



the trial told the jury that the defendant, by taking the horses from the plaintiff and turning them out of the vessel, had been guilty of a conversion. But the court held that he was wrong. "In my opinion," says Lord Abinger, "he should have added to his direction, that it was for them to consider what was the intention of the defendant in so doing. It is a proposition familiar to all lawyers, that a simple asportation of a chattel, without any intention of making any further use of it, although it may be a sufficient foundation for an action of trespass, is not sufficient to establish a conversion. It has never yet been held that the single act of removal of a chattel, independent of any claim over it, either in favor of the party himself or any one else, amounts to a conversion of the chattel."

In *Burroughes v. Bayne*, Martin, B., gives a definition of the word "conversion." "It means detaining goods so as to deprive the person entitled to the possession of them of his dominion over them." But by the words "so as to deprive" must, I think, where there has been nothing but a detention, be intended "with intent to," or the definition includes the cases of a carrier, wharfinger, packer, and a mere servant acting only as such without notice or demand. Channell, B., distinguishes between an "asportation" and a "simple asportation," and distinguishes them according to the intention of the defendant. This judgment seems to me to show that mere actual possession, if only with the intent to have custody of the goods, without reference to the question of property in them, is not a conversion; and that an asportation or actual removal and delivery of goods, if it be only a simple asportation, *i. e.*, if it be done with intent only to be a carrier of the goods, without reference to the question of property in them, is equally no conversion.

In *Lancashire Wagon Co. v. Fitzhugh*, it was held that the mere sale of goods by a sheriff, who had seized them, and who sold *bona fide* and without notice, was not a conversion. The new assignment was sustained because it averred that the sheriff not only delivered the goods, but caused the purchasers to use and damage the wagons. That allegation goes further than a mere asportation and delivery as a mere means of conveyance; and if it rested only on the delivery, as I think it might, it is because the delivery under a sale by a sheriff or by an auctioneer is a delivery with intent to pass the property, and so more than a simple asportation or delivery.

The true proposition as to possession and detention and asportation seems to me to be, that a possession or detention, which is a mere custody or mere asportation made without reference to the question of the property in goods or chattels, is not a conversion. This seems to me to be the proposition also to be deduced from the American cases









which are ably set forth in the 3d vol. of Robinson's Practice of Courts of Justice, pp. 452-462. "The idea of property," he says (p. 459), "is of the essence of a conversion. He then quotes the judgment of Wardlaw, J., in the case of *Nelson v. Whatmore*. "This action was brought to recover the value of a slave named Frank, a man of doubtful color, who was passing as free in a public conveyance, and was taken as his servant by the defendant; and the case turned upon the inquiry whether the defendant knew Frank to be a slave. 'If he did not, the treatment of Frank as a servant, and consequent facilities of escape afforded to him, may,' said Wardlaw, J., 'have been acts in themselves lawful, certainly did not indicate an assertion of property.'" In this case there were, as must be seen when it was proved that in fact Frank was the plaintiff's slave, possession and use by the defendant; but under the circumstances, that is, on account of the want of knowledge that the man was a slave, a possession and use without reference to any question of property in the plaintiff, the defendant, or any one else.

On the whole, therefore, I come to the conclusion that a broker who, acting only as such, negotiates a bargain of purchase and sale, and passes a delivery order, is not thereby guilty of a conversion, so as to be liable in an action of trover; and that in this case the asportation, which we are bound to consider, according to the leave reserved, as a simple asportation, without reference or intention as to whose was the property in the goods, is likewise not a conversion. In my opinion the judgment of the Court of Queen's Bench ought to be reversed.

BYLES, J. I concur in the judgment of my brother Brett. I have had the advantage of reading the judgment of my Lord Chief Baron, and, as it is impossible for me to add any thing to it, I merely wish to state that I agree with the reasons on which it is founded.

MARTIN, B. My brother Channell concurs in the judgment I am about to deliver.

This is an appeal from a judgment of the Court of Queen's Bench, and the question is whether certain acts of defendants, done under certain circumstances to thirteen bales of cotton, are, in law, a conversion within the meaning of that term in an action of trover. The origin of the action of trover is, I believe, correctly stated in *Burroughes v. Bayne*; it was founded on a fiction which at one period it was deemed within the authority of courts of law to invent, and further, to prohibit any contradiction of. The object of this fiction was to get rid of wager of law, which existed in the action of detinue. Bramwell, B., in the above case, much objected to the word "conversion," and when there is a word in common and ordinary use, with a well-understood popular meaning, it is to be lamented that it should be used in a legal

sense with an artificial and "conventional" meaning. But as regards the action of trover, I think it is well settled that the assumption and exercise of dominion — and asportation is an exercise of dominion — over a chattel inconsistent with the title and general dominion which the true owner has in and over it is a conversion, and that it is immaterial whether the act done be for the use of the defendant himself or of a third person. This is stated to be the legal meaning of the term "conversion" by Alderson, B., in the case *Fouldes v. Willoughby*. I believe all the cases that exist were cited in the argument by the learned counsel, but it is unnecessary to refer to them, as they are collected in a note (a) by Sir E. V. Williams in his last edition of *Saunders's Reports*, vol. ii. p. 108, *Wilbraham v. Snow*; and the result is what I have stated. The case of the carrier was referred to as inconsistent with the above definition. The trade of a common carrier is one of few occupations which the person carrying it on is bound by law to exercise upon the requirement of a person bringing him goods to be carried, and it would be unjust that he should be bound by law to do an act which the law, in the event of the person bringing the goods not being the true owner, declared to be an unlawful act; it has, therefore, been deemed that the carrying of goods by a carrier from terminus to terminus, upon the requirement of a person wrongfully in possession of them, is not a conversion, although, if the true owner intervenes before the goods be delivered and demands them, and the carrier refuses to deliver them, he is liable in an action of trover. But the case of *Greenway v. Fisher* was mainly relied on for the defendants. It was trover for calico. The plaintiff had intrusted it for sale to Messrs. E. & Co., and they had pledged it to two of the defendants for money lent; but the defendants had employed one Woodward (a third defendant), a packer, to pack it, and he had done so, and shipped it at the custom-house, making an affidavit that he was the real owner; it was objected that Woodward was not liable, as he had only acted in the regular discharge of his duty. Abbott, C. J., is stated to have said that the circumstance of Woodward acting in the ordinary course of business, and in the course of trade, made an exception to the general rule; and that the distinction between the case and the case of a servant was that this was a public employment; he referred to the case of the carrier, and said he was a mere conduit pipe. A verdict was taken for Woodward. It does not appear that this ruling has ever been acted upon except in the present case; there was no opportunity of taking the opinion of the court above upon it, as there was a verdict against the other defendants; and, notwithstanding the high authority of Abbott, C. J., should a similar case occur, I think it would be a matter to be reconsidered. I do not think that the employment of a packer











is a public employment like that of a common carrier for hire. Nor is he bound by law to exercise his employment except at his own pleasure.

The facts of the present case are these: The plaintiffs were the true owners of thirteen bales of cotton; the possession of them had been obtained by a person called Bayley by a fraud. On the 13th of December, 1869, the defendants bought the cotton from Bayley, for cash payable the same day, and proceeded at once to sample it, *i. e.*, to take a portion out of each bale, which their servants did; and about half an hour afterwards they exhibited these samples to a Mr. Micholls, who examined them, in order to judge of the quality, and, having inquired as to the quantity and price, agreed to take the cotton. It is not stated that Bayley's name was mentioned to Mr. Micholls, but the price was stated, and he agreed to buy it, and afterwards paid the price, with the addition of £1 4s. 10d. for commission and 6s. 6d. for portorage. The next step was that the defendants sent one of their clerks with a cart, driven by a carter paid by them, to Bayley's warehouse. The cotton was delivered to the clerk, loaded on the cart, and taken to the railway station, from which it was forwarded to Mr. Micholls' firm, at Stockport, and the price was paid by them to the defendants. These are the acts which the plaintiffs rely on as constituting the conversion: The defendants took the cotton into their corporeal possession, they carted it from Bayley's warehouse to the railway station, and delivered it there to be forwarded to Mr. Micholls, at Stockport, knowing that it was intended to be spun into yarn, and received the price. This is, to my mind, a conversion within the above definition. But it is alleged that there was no conversion by reason of the following circumstances: The defendants were cotton brokers, and the firm of which Mr. Micholls was a partner were their customers. On the morning of the 23d of December they received a message from the firm stating that they were coming over to Liverpool that day to purchase cotton through them. The cotton which they bought of Bayley was such cotton as the defendants were in the habit of buying for Mr. Micholls' firm, and when they purchased the cotton from Bayley they intended to buy it as brokers for the firm, believing that it was such cotton as they were likely to buy, and that it would suit them, and that on their arrival at Liverpool they could take it. The defendants had many customers, and frequently buy cotton in this way, believing that it will suit, and feeling satisfied that their customers will take it, or, if not, that they could be able to place it with some other customer. The learned judge who tried the cause left two questions to the jury: first, whether the thirteen bales of cotton were bought by the defendants as agents, in the course of their business as brokers;

and secondly, whether they dealt with the goods only as agents for their principal. The jury found both questions in the affirmative, and the verdict was entered for the defendants. In one sense this finding was correct. I have no doubt the defendants throughout meant to act as brokers; but in another sense I think it incorrect. I think the facts show a sale by Bayley to the defendants, and a resale by them to Messrs. Micholls, and that however confident the opinion or expectation of the defendants may have been that Messrs. Micholls would take the cotton, I do not think they stood to them in the relation of principals; and in my opinion Bayley, had he been the true owner of the cotton, could not have maintained an action against them for the price, and his only remedy would have been against the defendants. For the present purpose, however, we must assume that the verdict was right, and in my opinion the facts found by the jury are immaterial. The plaintiffs were strangers to the sale by Bayley, whether it was to the defendants or to Mr. Micholls. I think they are entitled to treat the defendants as wrong-doers, wrongfully intermeddling with their cotton, which they had no legal right to touch; and that when they removed the cotton from the warehouse where it was deposited to the railway station, to be forwarded to Stockport to be spun into yarn, and received the price of it, they committed a "conversion." What does it concern the plaintiffs whether the defendants dealt with the cotton and acted as brokers or agents or principals; they may not have known what the defendants were? Their acts towards the cotton were the same whether they filled the one character or the other. They dealt with them as men committing a wrong and tort towards the plaintiffs' chattel, and in my opinion the acts which they did constitute what the law deems a conversion, notwithstanding that they acted as brokers or agents. It was well put by the learned counsel for the plaintiffs, that suppose the defendants had bought the cotton for a foreign principal, and instead of carting the cotton to the railway station had carted it to the docks to be put on board a steamer to forward it to Bordeaux, could it be that the plaintiffs were bound to go to France to recover the value of their cotton, and have no remedy against the defendants? There is no doubt that the plaintiffs could maintain some action against the defendants, who, without lawful authority, intermeddled with their cotton, and in my opinion the action is trover. It may be that, upon this principle, persons may be made liable for the value of a chattel by reason of a very trifling act; but I doubt whether the law could be advantageously altered. It was said that the defendants were innocent of all intention of wrong. There is no doubt of this; but the plaintiffs and Messrs. Micholls were equally innocent, and there can be no doubt that the plaintiffs could have maintained an











action of trover against Messrs. Micholls. They actually converted the cotton in the popular sense by spinning it into yarn; and when a loss must fall upon one of the innocent parties, the consideration of hardship ought to be altogether put aside, and the loss imposed where the law casts it. See *Stephens v. Elwall*. I am of opinion that the judgment of the Court of Queen's Bench was right, and ought to be affirmed.

I have, since the above was written, had an opportunity of reading my brother Brett's judgment. I quite agree in the case he puts; viz., A., real owner of goods, which were in wrongful possession of B., with no power to sell, who employed a broker to sell, who sold them to C., and all that the broker did was to send bought and sold notes to B. and C., that no action of trover or any other action could be maintained by A. against the broker. He did nothing but make a contract which was utterly void against A. It is like the sheriff's case referred to by my brother Brett.

But that is not the present case; here the defendants bodily inter-meddled with the goods. I further agree that we must take the finding of the jury to be a part of the case, and must take it: first, that the cotton was bought by the defendants as agents in the course of their business of brokers. This, I presume, means that cotton brokers deal with cotton in the same manner as the defendants dealt with this parcel. For no one can doubt but that the defendants bought the goods as principals from Bayley. Secondly, that they dealt with them only as agents to their principal. This finding, as I have said, is in my judgment immaterial; whether a man who deals wrongfully with my goods be an agent or principal seems to me to be of no consequence.

CLEASEY, B.<sup>1</sup> I agree in the judgment of my brother Martin; but I wish to add a few words to show that I agree substantially with the reasons given by the learned judges in the Court of Queen's Bench, and I do not think that, when properly considered, they are at variance with the finding of the jury.

It was an action of trover to recover the value of certain cotton; and there being a plea of not guilty, the question was, whether there was sufficient evidence of a conversion. The defendants were brokers, and the jury found that in dealing with the cotton the defendants had acted in their character of brokers and not as principals; and the defendants contended that this finding, when applied to the circumstances of the case, had the effect of negating a conversion by the defendants.

In order to apply this finding it is necessary to consider the facts as

<sup>1</sup> This judgment was read by Martin, B.

stated in the case on appeal; and I may as well at once indicate what my conclusion is, viz.; that although the defendants never intended to buy on their own account, and to act in any other character than that of brokers; and although the sellers never understood them to buy on their own account as the real principals, or to act in any other character than that of brokers (as the jury quite properly found), yet by reason of the real principals not being known, and therefore not disclosed at the time when the bargain was made, the defendants necessarily became the parties to the contract, until the real principals being ascertained were named and adopted by the sellers as the persons they would look to. The plaintiffs were the owners of thirteen bales of cotton, of which a person named Bayley, who carried on business as a cotton broker under the firm of H. K. Bayley & Co., had obtained possession by means of a fraud. Paragraph 8 states the transaction between Bayley and the defendants. It appears from the statement there that the defendants, who were known to be acting as brokers, having been shown samples of cotton *ex* "Minnesota," agreed to buy the thirteen bales at the price of  $11\frac{1}{4}$ d. per lb., and they were to send the name of their principal in the course of the day. They also agreed at the same time to buy twenty-five other bales; and the following memorandum was handed by Bayley to the defendants: "We sell you 13 B/s  $11\frac{1}{4}$ ,—25 B/s  $11\frac{1}{8}$ . Cash to-day per H. K. Bayley & Co."

It seems clear that this was not a conditional transaction (I mean conditional upon the name of the principal being sent in), but an absolute sale between Bayley and the defendants. The defendants, being brokers, wished to secure the sale of the cotton, and were content to bind themselves, having no doubt as to finding a purchaser; and Bayley was satisfied with the price and the responsibility of the defendants, although the defendants were not to buy as real principals and sell at a profit, but as brokers for a principal whose name was to be given. It would be most unreasonable to suppose that Bayley was to take as principals any persons whatever whose names the defendants sent in, whether he approved of them or not, or that the contract should be conditional upon his approving of them. And accordingly it was not contended before us that the transaction was a conditional one, but that the defendants were acting as brokers in the transaction, as was undoubtedly the fact.

That being so, it was necessary that the defendants, in order to find principals, or (which is the same thing) purchasers, should require samples of the thirteen bales, the subject of the contract; and they apply to Bayley, as I apprehend they had a right to do, and their servants take the samples. It appears to me that it might well be contended that this taking the samples out of the thirteen bales which formed the









subject of sale to them was exercising an act of ownership. For as soon as the thirteen bales were ascertained, the defendants had a right to deal with them subject to any claim which Bayley, as unpaid vendor, might insist upon, which he does not appear to have done.

But it is not necessary to insist upon this act of ownership as a conversion, because what takes place afterwards on the same day makes the matter, in my opinion, quite clear. As soon as Micholls, Lucas, & Co. agree to buy the cotton, the defendants send a delivery order to Bayley, in which the name of their principals, Micholls, Lucas, & Co., is given according to their engagement. This delivery order was to deliver to the bearer, who was Thompson, the servant of the defendants; and accordingly Bayley writes across it, "To Joseph Thompson," and signs this, and Thompson indorses a receipt for the cotton. See paragraph 14.

It thus appears that the delivery was not to Micholls, Lucas, & Co. (who would have to settle with the defendants for the price before they were entitled to delivery), but to the defendants; and accordingly, after this has been done, and the cotton has been weighed, Bayley sends in his invoice for the cotton; and although the name of Micholls, Lucas, & Co., the real principals, had been disclosed, the invoice is sent in to the defendants, and they are made the debtors. The invoice is set out in paragraph 14, and headed thus: "Messrs. Francis Hollins & Co. Bought from H. K. Bayley & Co." It is plain, therefore, that Bayley refused to deal with Micholls, Lucas, & Co. as principals, and held the defendants as the persons responsible to him as buyers, which he was entitled to do, no principal having been disclosed when the contract was made. It was therefore in this right, as the persons entitled to the possession of the cotton as buyers from Bayley, that the defendants obtained possession of it for the purpose of transferring the property in it to their principals, Micholls, Lucas, & Co., and this dealing with the property appears to be a clear conversion upon all the authorities. The defendants acted as brokers, but from the circumstances attending the contract they become themselves interested in it.

I wish to add, that in my opinion it is not necessary to overrule *Greenway v. Fisher*. That case is like the case of shoeing a horse, or mending a watch, and sending it home. It is true that the shipment was in the name of the defendant, but no one would suggest that by writing his name in as owner he intended to claim the property or to deal with the property. It was only complying with the directions as to sending the goods back, and the entry of the name was a necessary form for the purpose. In that case there was no intermeddling with the property in the chattel; in the present case all that is done is for the purpose of transferring the property.



The action of trover is not founded upon contract or upon any particular relation of the parties, but upon property, and supposes the owner to have lost the goods, as the plaintiffs may in some sense be said to have done in this case; and the liability under it is founded upon what has been regarded as a salutary rule for the protection of property; namely, that persons deal with the property in chattels or exercise acts of ownership over them at their peril.

No one could dispute that if the defendants had made a subsale of the cotton they would have been responsible, though they bought it and paid for it in the ordinary way; and if they are not responsible in the present case it follows that they could, at their option, select any persons they thought proper to deliver the cotton to, and make the persons so selected by them the only persons responsible to the plaintiffs, the real owners.

KELLY, C. B. In this case, but for the finding of the jury, I should have been prepared to agree with the learned judges of the Queen's Bench, that there was evidence to be submitted to the jury of such a conversion by the defendants as might have sustained this action, though I am by no means satisfied that any such verdict ought to have been found. But after carefully considering the judgments of the learned judges, I do not see that any effect is given to the finding of the jury, and it seems to be assumed that the defendants acted in the transaction as purchasers and sellers, and not as brokers.

It is necessary, therefore, to look to what the jury have expressly found, and consider its effect upon the case as it is now before us upon a motion to enter a verdict for the plaintiffs. The questions left by my brother Willes to the jury were, whether the thirteen bales were bought by the defendants as agents in the course of their business as brokers, and whether they dealt with the goods only as agents to their principals; and upon both points the jury found for the defendants.

Before, therefore, the defendants could be treated as principals in the sale and purchase of the goods, it seems to me that these findings of the jury should have been set aside. But not only has this not been done, but it was stated at the bar, and not denied, that a motion had been made in the Queen's Bench to that effect, and a rule refused. The defendants, then, having throughout acted as brokers and dealt with the goods only as agents to their principals, it would be to extend the doctrine of conversion far beyond the operation of the authorities cited at the bar, to hold that they were more than conduit pipes (to use the expression of Lord Tenterden) between Bayley and Micholls & Co., or that they were guilty of a conversion in merely negotiating the purchase and sale, and assisting as agents in the transfer of the goods from Bayley to Micholls & Co. It is true that as Micholls &









Co. were not named at the time of the purchase, the vendor might have held the defendants personally liable; but as the price was paid to the vendor, and with the money of the real purchasers, the defendants receiving only their commission as brokers, it does not appear to me that this circumstance altered the character of the transaction, and made the acts of the defendants to amount to a conversion.

I cannot think that the doctrine of conversion, as applied to transactions effected openly *bona fide* and in the ordinary course of the business of merchants and brokers in London or Liverpool, should be extended in the smallest degree beyond the necessary result of established decisions. And the logical and exhaustive judgment of my brother Brett, which I have had an opportunity of reading, seems to me to show that brokers are not more within the scope of those decisions than carriers or packers. Why should a broker who negotiates a contract between buyer and seller, in his character of broker, being the mere medium of communication between the one and the other, and deriving no other benefit from the transaction than his commission, be made liable for the whole value of the goods purchased and sold, any more than the packer who packs and ships the goods, or the railway company that conveys them from the seller's to the purchaser's premises? And that because the real owner has permitted himself to be defrauded of them by the pretended sellers. Surely in such a case where one of two innocent parties must sustain a loss, it should be he who by having intrusted his property to an untrustworthy person has enabled or facilitated the commission of the fraud by which the loss has been occasioned.

It is true that a conversion has been correctly defined to be the exercising of dominion over property inconsistent with the title of the owner. But justice, expediency, public policy, and common sense, have introduced exceptions or qualifications to this doctrine. A carrier, who delivers a quantity of merchandise to one who claims and receives it as owner, a packer, who packs and prepares for shipment and actually ships and consigns goods to one who receives and deals with them as his own, exercises dominion over them adversely to and inconsistent with the rights of the true owner. Why, then, should not a broker, who interferes in the transfer of goods, not in his own right or on his own account, or claiming them as his own, but as the medium only between the vendor and the purchaser, deriving no benefit from the transaction except his commission, be held equally within the exception which has been applied to carriers and packers? Considering the vast number and variety of the transactions effected, and the immense amount of property dealt with by brokers acting in the ordinary and accustomed course of business, in London and Liverpool, and other

great commercial towns, it seems most unreasonable and unjust that they should be bound to inquire into the titles of all the sellers of all the merchandises in respect of which they negotiate contracts as brokers, or incur the risk of being compelled to make good the value to some unknown owners, who have been improvident enough to part with them to a dishonest person, in whom they have reposed a misplaced confidence. Then can it make any difference that the broker, acting under a *del credere* commission, or otherwise, as by contracting for an unnamed principal, makes himself personally liable? I think not, and that he must still be treated as an agent only. If he were so liable, a mere collateral surety for the acceptance or delivery, or the payment of the price of goods, might be held guilty of a conversion without having interfered in the transaction except by becoming such surety. It may be true that in some cases the taking of samples or the carting and delivery of goods may be a conversion by a purchaser, who treats them as his own; but a broker who does these acts, in the capacity of broker only, is no more guilty of a conversion than an officer at the London Docks who draws samples of wine in a warehouse, or a railway carrier who sends his own carts and conveys goods between the railway and the premises of the consignor and consignee. The case of goods sent abroad, where they cannot be traced and followed by the owner into the hands of the purchaser, rests altogether upon an exceptional principle, which I think inapplicable to the present case. And on the ground that the defendants here have acted as brokers and brokers only, and have exercised no dominion over these goods in their own right and for their own benefit, I am of opinion that they are not guilty of a conversion which will support this action, and the verdict they have obtained ought not to be disturbed.

*Judgment affirmed.*

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ENGLAND v. COWLEY.

IN THE EXCHEQUER, JANUARY 16, 1873.

[Reported in *Law Reports*, 8 *Exchequer*, 126.]

TROVER for household furniture. Plea: Not guilty by statute (11 Geo. II. c. 19, § 21). Issue.

The plaintiff was the holder of a bill of sale over the household furniture of Miss Morley, the tenant to the defendant of a house in River Terrace, Chelsea. The bill of sale contained the usual clauses enabling the plaintiff to take possession of and remove and sell the furniture in case of default upon Miss Morley's part in payment of the sum ad-











vanced. She having made default, the plaintiff put a man in possession early in August, 1872, and upon the 11th of August sent two of his men with vans to remove the furniture from the house. It was then after sunset. The men were met at the house by the defendant, the landlord, who alleged that half a year's rent was due and in arrear, and stated that he did not intend to allow the goods to be removed, as he meant to distrain on the day following. One of the men returned and informed the plaintiff of what had passed. The plaintiff thereupon went to the house himself, and was told by the defendant, who was in the passage, that he would not suffer any of the goods to be taken away until his rent was paid. The defendant had also engaged a policeman, whom he stationed outside, to prevent the removal of the goods. The plaintiff thereupon gave up the attempted removal and went away, leaving a man still in possession. The defendant did not himself actually take possession of or remove any of the goods upon this occasion. His object was to prevent the plaintiff's removing them, in order to distrain the next day at a legal hour.

The cause was tried before Bramwell, B., at the Surrey summer assizes, 1872. In summing up, the learned judge directed the jury in the following terms: "If you are of opinion that the defendant did not deprive the plaintiff of his goods, did not take possession of nor assume dominion over them, but merely prevented the plaintiff from removing them from one place to another, allowing him to remain in possession of them if he liked, then there is no cause of action." The jury answered this question in favor of the defendant, and a verdict was entered for him accordingly, with leave to enter a verdict for the plaintiff for £40, the value of the goods, if the court should be of opinion that the learned judge ought to have directed a verdict for the plaintiff. A rule was obtained in Michaelmas term accordingly, on the ground that the learned judge ought to have directed the jury that the conversion was proved.

*Holl* showed cause. There was no evidence of a conversion. Throughout the plaintiff had possession of his goods. All that the defendant did was to assert his right to prevent their removal, and if the plaintiff chose to yield and not remove them, that is not evidence of conversion. The same would be true if he had actually prevented their being taken out of the house. But he did not go so far. He only threatened to prevent the plaintiff from taking them away. *Fowler v. Hollins*; *Burroughes v. Bayne*.

[*MARTIN*, B. In *Fouldes v. Willoughby*, Alderson, B., says, that any act "inconsistent with the general right of dominion which the owner of the chattel has in it, who is entitled to the use of it at all times and in all places," amounts to a conversion. Has not the de-

fendant here done what is inconsistent with the plaintiff's general right?]

No. He never was in possession of the goods. The act done must be either asportation or detention. The finding of the jury, moreover, really concludes the case.

*Joyce*, in support of the rule. It is impossible to say there was no evidence of conversion. There was a complete and effectual interference with the plaintiff's rights as owner. The jury have found, not merely that the defendant threatened to prevent, but that he did prevent, the removal of the goods. This was "an exercise of dominion over them inconsistent with the true owner's title." See *Wilbraham v. Snow*.<sup>1</sup> It was an unqualified assertion of right which the plaintiff could only have questioned by force, and by which he was "wrongfully deprived of the use and possession of his goods." See Common-law Procedure Act, 1852, sch. B, form 28.

[BRAMWELL, B. The form for a declaration in trover given in the Common-law Procedure Act, 1852, sch. B, which alleges that the defendant "converted to his own use, or wrongfully deprived the plaintiff of the use and possession of the plaintiff's goods," does not enlarge the scope of the action. The alternative words were inserted at the suggestion of Lord Denman, with a view merely of explaining the nature of "conversion."]

The defendant's act amounted to a detention of the goods from the plaintiff.

POLLOCK, B. I am of opinion that this rule should be discharged. The defendant was never in possession of the goods. No doubt cases might be put where a wrong-doer, though not in actual possession, uses such force or contrivance as to interfere entirely with the dominion of the true owner; but here there was a mere assertion of right on the defendant's part. I think the plaintiff should have insisted upon removing the goods, if he intended afterwards to challenge the defendant's assertion in an action of trover. It is a sound rule of law which is laid down in Co. Litt. 253 *b*, where continual claim is treated of, that it is not every cause of fear which can excuse a person from not claiming his rights. The fear must not be a "vain feare." It must be "some just cause of feare." Now in this case the plaintiff proved no act of interference, but only a threat, which the plaintiff, if he meant afterwards to stand by his rights, ought to have resisted. Mr. *Joyce* has urged that the defendant detained the plaintiff's goods; but in fact he never had them to detain. He merely said, "You shall not remove them." That is not enough to furnish ground for this action.

<sup>1</sup> 2 Notes to Saund. by Wms. pp. 87, at p. 108, n. (a).











BRAMWELL, B. I am of the same opinion. I think no action is maintainable, because the defendant did not act, but only threatened that, in a certain event, he would do something. The plaintiff should either have proceeded with the removal of the goods, or at least have commenced to remove them, leaving the defendant to stop him at his peril, when there might have been a cause of action of some sort. But, further, even if the defendant had prevented the removal of the goods by physical force, I do not think trover would have been maintainable. The substance of that action is the same as before the Common-law Procedure Act, 1852, and although, in the form of declaration there given in sch. B, the words used are, "converted to his own use, or wrongfully deprived the plaintiff of the use and possession of the plaintiff's goods," the gist of the action is the conversion, as for example, by consuming the goods, or by refusing the true owner possession, the wrong-doer having himself at the time a physical control over the goods. Now here the defendant did not "convert" the goods to his own use, either by sale or in any other way. Nor did he deprive the plaintiff of them. All he did was to prevent, or threaten to prevent, the plaintiff from using them in a particular way. "You shall not remove them," he said, but the plaintiff still might do as he pleased with them in the house. Assume that there was actual prevention, still I think this action cannot be maintained. Take some analogous cases by way of illustration. A man is going to fight a duel, and goes to a drawer to get one of his pistols. I say to him, "You shall not take that pistol of yours out of the drawer," and hinder his doing so. Is that a conversion of the pistol by me to my own use? Certainly not. Or, again, I meet a man on horseback going in a particular direction, and say to him, "You shall not go that way, you must turn back;" and make him comply. Who could say that I had been guilty of a conversion of the horse? Or I might prevent a man from pawning his watch, but no one would call that a conversion of the watch by me. And really this case is the same with these. Illustrations of my meaning might be easily multiplied. The truth is, that, in order to maintain trover, a plaintiff who is left in possession of the goods must prove that his dominion over his property has been interfered with, not in some particular way, but altogether; that he has been entirely deprived of the use of it. It is not enough that a man should say that something shall not be done by the plaintiff; he must say that nothing shall. Now here there was no interference with the plaintiff's rights, except the statement by the defendant that he would prevent the goods from being removed. This is not sufficient to furnish a basis for the present action. For it must be remembered that if the defendant is liable at all, it is for the value of the goods. But how unjust that would be! The plain-

tiff's man was left in possession. Miss Morley could not legally take away the goods. If she did, the plaintiff could maintain an action against her for their wrongful removal. Yet he is also to be able to recover their full value against the defendant. Moreover, I cannot but think that the jury really negatived all idea of conversion. "If you are of opinion," they were told, "that the defendant did not deprive the plaintiff of his goods, did not take possession of nor assume dominion over them, but merely prevented the plaintiff from removing them from one place to another, allowing the plaintiff to remain in possession of them if he liked," then there is no cause of action. The jury answered this question in favor of the defendant. There had, therefore, been no general assertion of right to the exclusion of the plaintiff.

MARTIN, B. I think this rule should be made absolute. The real question is whether the defendant "converted to his own use, or wrongfully deprived" the plaintiff of his goods. Now it appears that the plaintiff had a bill of sale over the goods of one Morley, whose landlord the defendant was. After sunset on the 11th of August, 1827, when a distress was impossible, the plaintiff, who had previously put a man in possession, went himself to the house with the view of removing the goods, there having been a default under the bill of sale. The defendant could not distrain that evening, but, in order to have the opportunity of distraining, he told the plaintiff he would prevent the goods being removed, and he took steps accordingly, placing a policeman to watch the house and to prevent the removal. I think this was a conversion. The plaintiff was not bound to resist the defendant, and to remove his goods at the peril of coming into collision with him. He was deprived, by the plaintiff's act, of the power over his goods which he was entitled to exercise. That is, in my opinion, enough to enable him to maintain this action. If the defendant had been in the room where the goods were, and had said to the plaintiff, "These goods shall not be removed," surely that would have been a "wrongful deprivation." The defendant was, in fact, not in the room but in the passage, with equal means, however, of stopping the removal. I can see no difference between the two cases.

KELLY, C. B. I am of opinion that this rule should be discharged. The defendant, in my judgment, never converted these goods to his own use. The plaintiff was himself in actual possession of them, and all the defendant did was to say, "Rent is due to me, and before that rent is paid I will not allow these goods to be removed." This is no conversion. Many illustrations might be put to show how absurd would be the consequences of so holding. For instance, suppose a lodger was ill, and an attempt were made to remove the bed he was lying on. Some one interferes, and says to the man who wants to remove, and









who is the true owner, "You shall not do so." This is an interference with his dominion over his own property; yet there would be no conversion. Indeed, it is only by relying upon the somewhat vague language which has been used about this form of action that any plausible argument can be maintained. Apart from mere *dicta*, no case, so far as I am aware, can be found where a man not in possession of the property has been held liable in trover unless he has absolutely denied the plaintiff's right, although, if in possession of the property, any dealing with it, inconsistent with the true owner's right, would be a conversion. A limited interference with the plaintiff's property, where all along the plaintiff is himself in possession, does not constitute conversion. In the case of *Fowler v. Hollins*, the cotton was in the defendant's actual possession. I thought him not guilty because he was acting as broker merely; but even assuming the case was well decided, the plaintiff was out of possession, and the defendant had full control over the goods. So also in *Wilbraham v. Snow*,<sup>1</sup> the plaintiff's tools were entirely under the control of the defendant. Nor does the case referred to by my brother Martin, of *Fouldes v. Willoughby*, really assist the plaintiff; for the *dictum* of Alderson, B., which at first sight appears to favor his contention, is founded upon the assumption that the plaintiff was out of actual possession of the goods.

I think, therefore, that the plaintiff must fail in this form of action. He may have another remedy by some form of action of trespass on the case, but the measure of damages would be different. It would be unjust that, under the circumstances proved, he should recover against the defendant the value of the goods. The rule must, therefore, be discharged.

*Rule discharged.*<sup>2</sup>

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## HIORT v. BOTT.

IN THE EXCHEQUER, FEBRUARY 12, 1874.

[Reported in *Law Reports*, 9 *Exchequer*, 86.]

ACTION of trover for barley, tried before Archibald, J., at the Staffordshire summer assizes, 1873.

The facts were as follows: The plaintiffs, who were corn merchants, trading under the name of Brochner & Co., at Hull, had been in the habit of employing one Grimmett as their broker. In consequence of a telegram from Grimmett, they, on the 8th. of June, 1872, forwarded to the London and North-western Railway station at Birmingham eighty-

<sup>1</sup> 2 Notes to Saund. by Wms. 87.

<sup>2</sup> *Boobier v. Boobier*, 39 Me. 406; *Polley v. Lenox Iron Works*, 2 All. 184; *Platner v. Johnson*, 26 Miss. 142, acc. *Conf. Guthrie v. Jones*, 108 Mass. 191; *Crockett v. Beaty*, 8 Humph. 20. — Ed.



three quarters of barley, and at the same time sent to the defendant, who was a licensed victualler carrying on business at Deritend, Birmingham, a letter, inclosing an invoice for the barley, in which it was stated to be "sold by Mr. Grimmett as broker between buyer and seller," and a delivery order, which made the barley deliverable "to the order of consignor or consignee." The barley had, in fact, never been ordered by the defendant, who had had no previous dealings with either the plaintiffs or Grimmett. A day or two after the receipt of these documents by the defendant, Grimmett called; the defendant produced the documents, and said, "What does this mean? I never bought any barley through you of Brochner & Co." Grimmett said, "It was a mistake of Brochner & Co.; they had, no doubt, confused the defendant's name and some other name; they were doing a large business, and might have made a mistake." Grimmett then asked the defendant to indorse the order, telling him that he could not get the barley without, and that by not sending the order back expense would be saved. Thereupon the defendant indorsed the delivery order to Grimmett, who took it to the railway station, obtained delivery of the barley, disposed of it, and absconded.

In answer to a question by the learned judge, the jury found that the defendant, in signing the order, had no intention of appropriating the barley to his own use, but was anxious to correct what he believed to be an error; and, on the learned judge adding, "and with a view of returning the barley to the plaintiffs," they assented.

The learned judge then directed the verdict to be entered for the defendant, with leave to the plaintiffs to move to enter the verdict for them for £180, the value of the barley. A rule having been obtained accordingly,

Feb. 10. *Jelf* (*Powell*, Q. C., with him) showed cause. The cases in which trover will lie are enumerated by Alderson, B., in *Fouldes v. Willoughby*, as follows: "The true principle is that stated by Chambre and Holroyd, JJ., when at the bar, in their argument in the case of *Shipwick v. Blanchard*, that, 'in order to maintain trover, the goods must be taken or detained with intent to convert them to the taker's own use, or to the use of those for whom he is acting.' This definition, indeed, requires an addition to be made to it; namely, that the destruction of the goods will also amount to a conversion." That statement is adopted in 2 Notes to Saunders, p. 108, in these words: "The taking or detention of the chattel must be with intent to convert it to the taker's own use, or that of some third person; or the act done must have the effect of destroying or changing the quality of the thing." Another test is suggested by the judgment of Cleasby, B., in *Fowler v. Hollins*, that the act must be one "dealing with the property." Tried by any of these rules, there was here no conversion; for the defendant









intended nothing but to return the barley to the plaintiffs, and had no thought of dealing with the property. Tried by the test of reason, the result would be the same. For if a man has goods sent to him which he has never ordered, whether by mistake, or on approval, or by way of advertisement, he becomes an involuntary bailee, and is called upon by the act of the sender to do something with them, unless he means to keep the goods as his own. Then what is he to do? It is certainly not unreasonable that he should take steps to return them to the sender; and, unless in what he does he is guilty of gross carelessness, he ought not to be held liable for their miscarriage. That is what the defendant has done here; he took steps to return the goods to the owners through the owners' agent; and he ought not to be made liable for that agent's fraud. His position is the same as, or better than, that of the defendants in *Heugh v. London and North-western Ry. Co.* and *M'Kean v. M'Ivor*.<sup>1</sup>

*Bosanquet* (*Huddleston*, Q. C., with him) in support of the rule. It is enough to constitute a conversion if the defendant, by means of an unauthorized act, has deprived the plaintiffs of the possession of their goods, either permanently or for an indefinite time. This is the effect of the decision in *Fowler v. Hollins*, and agrees with what is said by Alderson, B., in *Fouldes v. Willoughby*, and cited and approved by Martin, B., in delivering the judgment of the court in *Burroughes v. Bayne*. "Any asportation of a chattel for the use of the defendant or a third person amounts to a conversion, for this simple reason, that it is an act inconsistent with the general right of dominion which the owner of the chattel has in it, who is entitled to the use of it at all times and in all places. When, therefore, a man takes that chattel, either for the use of himself or of another, it is a conversion." Here the defendant has certainly done an unauthorized act, and one which was without excuse. There was no occasion for him to deal with the barley at all; for it was not in his possession, and no act of his was required to give the plaintiffs possession of it. His case is therefore wholly unlike that of an involuntary bailee, who has, against his will, the actual custody of the goods. That he did not mean to appropriate the barley to his own use is immaterial, if his act deprived the plaintiffs of their property.

*Cur. adv. vult.*

Feb. 12. The following judgments were delivered:—

BRAMWELL, B. This case was argued before my brothers Pigott and Cleasby and myself, and we are all of opinion that the rule must be made absolute. [After stating the facts the learned judge proceeded.]

I think the plaintiffs are entitled to recover; though, so far as con-

<sup>1</sup> Law Rep. 6 Ex. 36.

cerns the defendant, whose act was well meant, I regret the result. Mr. Bosanquet gave a good description of what constitutes a conversion when he said that it is where a man does an unauthorized act which deprives another of his property permanently or for an indefinite time. The expression used in the declaration is "converted to his own use;" but that does not mean that the defendant consumed the goods himself; for if a man gave a quantity of another person's wine to a friend to drink, and the friend drank it, that would no doubt be as much a conversion of the wine as if he drank it himself. Now here the defendant did an act that was unauthorized. There was no occasion for him to do it; for the delivery order made the barley deliverable to the order of the consignor or consignee, and if the defendant had done nothing at all it would have been delivered to the plaintiffs. And there is no doubt that by what he did he deprived the plaintiffs of their property; because, by means of this order so indorsed, Grimmett got the barley and made away with it, leaving the plaintiffs without any remedy against the railway company, who had acted according to the instructions of the plaintiffs in delivering the barley to the order of the consignee. The case, therefore, stands thus, that by an unauthorized act on the part of the defendant the plaintiffs have lost their barley, without any remedy except against Grimmett, and that is worthless. It seems to me, therefore, that this was assuming a control over the disposition of these goods, and a causing them to be delivered to a person who deprived the plaintiffs of them. The conversion is therefore made out.

Various ingenious cases were put as to what would happen if, for instance, a parcel were left at your house by mistake, and you gave it to your servant to take back to the person who left it there, and the servant misappropriated it. Probably the safest way of dealing with that case is to wait until it arises; but I may observe that there is this difference between such a case and the present one, that where a man delivers a parcel to you by mistake, it is contemplated that if there is a mistake, you will do something with it. What are you to do with it? Warehouse it? No. Are you to turn it into the street? That would be an unreasonable thing to do. Does he not impliedly authorize you to take reasonable steps with regard to it, — that is, to send it back by a trustworthy person? And when you say, "Go and deliver it to the person who sent it," are you in any manner converting it to your own use? That may be a question. But here the defendant did not send the order back; but at Grimmett's request indorsed it to him, though, no doubt, as the jury have found, with a view to the barley being returned to the plaintiffs. There is, therefore, a distinction between the case put and the present one. And











there is also a distinction between the case of *Heugh v. London and North-western Ry. Co.*, which was cited for the defendant, and the present case; because there it was taken that the plaintiff authorized the defendants to deliver the goods to a person applying for them, if they had reasonable grounds for believing him to be the right person.

On these considerations I think the plaintiffs are entitled to recover. But I must add one word. This is an action for conversion, and I lament that such a word should appear in our proceedings, which does not represent the real facts, and which always gives rise to a discussion as to what is, and what is not, a conversion. But supposing the case were stated according to a non-artificial system of pleading, thus: "We, the plaintiffs, had at the London and North-western Railway station certain barley. We had sent the delivery order to you, the defendant. You might have got it, if you were minded to be the buyer of it; you were not so minded, and therefore should have done nothing with it. Nevertheless, you ordered the London and North-western Railway Company to deliver it, without any authority, to Grimmett, who took it away." Would not that have been a logical and precise statement of a tortious act on the part of the defendant, causing loss to the plaintiffs? It seems to me that it would. I think, but not without some regret, that this rule should be made absolute, to enter the verdict for the plaintiffs.

CLEASBY, B. I am of the same opinion, and shall only add a few words for the purpose of making the ground of decision clearly understood, and of showing that we are not questioning or overruling any of the authorities referred to.

It should be particularly noticed in this case that the plaintiffs had not, by what they had done, placed the defendant in any position of difficulty, as is often the case with an involuntary bailee (an expression often used in the argument) who has received property into his possession for a purpose which cannot, as it afterwards appears, be exactly carried into effect, and who does his best and acts in a reasonable manner for carrying into effect the purpose of the bailment. In such cases the bailee has a duty to perform in relation to the goods, and he is placed in a difficulty in the discharge of that duty by the default of the plaintiff, who ought not to be allowed to complain if, under that difficulty, the bailee has acted in a manner which is considered reasonable and proper.

But no difficulty of that sort arises here, because the goods were consigned to the order of the consignee or consignor; and the defendant, being the consignee and in possession of the order, must have known that there was some mistake in making him consignee, and so the goods were properly deliverable to the order of the consignor. He had no

duty to perform in relation to the goods, and was a mere stranger, except that by mistake he had been made consignee, and so had an ostensible title, and could dispose of the goods. This distinguishes the present case from the cases against railway companies referred to in the argument.

It is also to be observed that the present case is different from a class of cases referred to in the argument, in which some act is done to goods, such as shoeing a horse, packing goods, or forwarding them on. In these cases no act is done having reference to the property in the goods or the right to the possession of them. The act is consistent with the title of any person. But in the present case the act of the defendant transfers the title to the possession of the goods, so as to cause them to be lost to the real owner.

The jury have found that the defendant did not intend to appropriate them to himself by the transfer, but intended them to be returned to the plaintiffs. According to the evidence, the object of the transfer was not to have the goods actually returned to the owner, but to dispense with the necessity of sending to the plaintiffs for a fresh order making the goods deliverable to the real purchaser; and, although it does not make any real difference, this must have been what the jury meant, because by the form of the note the goods were at the disposal of the plaintiffs if the defendant did nothing.

The ground of the decision in the present case is that the defendant had no title whatever to the goods, — that there was no necessity whatever for his interfering in any manner in the disposal of them, but that he improperly, though innocently, — being prevailed upon to do so by Grimmett, — having the *indicia* of title by mistake, as he knew, transferred that title to the possession of Grimmett. I think a person who deals with the property in this way does so at his peril, and if by means of it a fraud upon the owner is accomplished, he is responsible.

It was not left to the jury in this case to say whether the conduct of the defendant was reasonable and proper, but I do not think that this was necessary. No objection was made on the argument that this had not been done; but it was unnecessary, because to transfer voluntarily the title to the possession of goods, in which you have no interest whatever, to a third person, is, in my opinion, under the circumstances of the present case, obviously improper and unreasonable; and that is the ground of my judgment.

*Rule absolute.*<sup>1</sup>

<sup>1</sup> *Hawkes v. Dunn*, 1 Cr. & J. 519; *Fitzgerald v. Burrill*, 106 Mass. 446, acc. See *Purcell v. Jaycox*, 3 N. Y. Supreme Court R. 406. — Ed.











## WHEELOCK v. WHEELWRIGHT.

SUPREME JUDICIAL COURT, MASSACHUSETTS, MARCH TERM, 1809.

*[Reported in 5 Massachusetts Reports, 104.]*

THE declaration was in case, and alleged that the defendant on the 15th of January, 1806, hired a horse and sleigh of the plaintiff to ride from Boston into the country four miles, and to return at seven o'clock in the evening; yet the defendant so carelessly and immoderately drove and rode the said horse and sleigh, and neglected to take proper care of said horse; and exposed him after said immoderate driving and riding for so long a time to the extreme coldness of the weather, that by means thereof the said horse died, and the said sleigh was broken, &c.

The defendant pleaded the general issue of not guilty, and the cause was tried on the review at the last November term in this county, before the Chief Justice, when a verdict was found for the plaintiff, subject to the opinion of the court, upon the following case agreed by the parties, viz., on the 15th of January, 1806, between three and four o'clock in the afternoon, the weather being extremely cold, the defendant hired of the plaintiff in Boston the horse mentioned in the declaration, with a sleigh, to ride to the Punch Bowl in Brookline, distant about four and a half miles, the defendant saying that he should return by seven o'clock in the evening. No express price for the hire was agreed upon. After the defendant had ridden to the Punch Bowl, and tarried there about fifteen minutes, he rode on about four and a half miles further to Watertown. After staying there until past nine o'clock in the evening, he returned with the horse and sleigh to Gen. W.'s door in Boston, one of the general's family being in the sleigh, after ten o'clock. Having remained at the general's about five minutes, he took the horse and sleigh to return them to Wheelock; and having ridden about two rods the horse, after rearing up, fell dead on one of the shafts of the sleigh, which was broken by the fall. The sleigh was returned to Wheelock, and notice given by Wheelwright that the horse was dead. It was agreed that the defendant did not ride the horse immoderately, or neglect to feed or cover him properly with cloths.

If the court should be of opinion that on this evidence the plaintiff can, in this action, recover damages on account of the horse, it was agreed the verdict should stand; otherwise it should be set aside, and a general verdict entered for the defendant, and judgment be rendered accordingly.

At this term, after a brief argument by *Otis* and *Parker* for the plaintiff, and *Whitman* for the defendant, the opinion of the court was delivered by

PARSONS, C. J. [After stating the action and the facts.] Upon comparing the evidence with the declaration, we are satisfied that the case agreed has negatived the *gravamen* alleged by the plaintiff in his declaration, and that in this action the plaintiff cannot recover.

The defendant, by riding the horse beyond the place for which he had liberty, is answerable to the plaintiff in trover. For thus riding the horse is an unlawful conversion; and if the horse had been returned to the plaintiff, the defendant might have given it in evidence in mitigation of damages. As the horse was not returned, the plaintiff might have recovered the value of the horse in damages. What that value was must be settled by a jury. If the horse, in fact, labored under a mortal distemper, although unknown before his death, the damages would have been the value of a horse so diseased. But it would have been incumbent on the defendant to have proved that from any cause the horse was not worth the apparent value; and if he failed to satisfy the jury of the reduced value, the plaintiff ought to recover the apparent value.

According to the facts the plaintiff's action is misconceived. It should have been trover, and not case for improperly using the horse. And if this verdict should stand, it would not be a bar to an action of trover for a conversion by riding the horse to a place without the contract.

The verdict must be set aside, and a general verdict entered for the defendant.<sup>1</sup>

<sup>1</sup> *Hooks v. Smith*, 18 Ala. 338; *Frost v. Plumb*, 40 Conn. —; *Moseley v. Wilkinson*, 24 Ala. 411; *Fail v. McArthur*, 31 Ala. 26; *Mayor v. Howard*, 6 Ga. 219; *Phillips v. Brigham*, 26 Ga. 617; *Kelly v. White*, 17 B. Monr. 131; *Ripley v. Dolbier*, 18 Me. 382; *Morton v. Gloster*, 46 Me. 520; *Homer v. Thwing*, 3 Pick. 492; *Rotch v. Hawes*, 12 Pick. 136; *Lucas v. Trumbull*, 15 Gray, 306; *Hall v. Corcoran*, 107 Mass. 251; *Fisher v. Kyle*, 27 Mich. 454; *Fish v. Ferris*, 5 Duer, 49; *Disbrow v. Tenbroeck*, 4 E. D. Smith, 397; *Beach v. R. R. Co.*, 37 N. Y. 457; *Woodman v. Hubbard*, 25 N. H. 67; *Angus v. Dickerson*, Meigs, 459, *Horsely v. Branch*, 1 Humph. 199; *Mullen v. Ensley*, 8 Humph. 428; *Price v. Allen*, 9 Humph. 703; *Bell v. Cummings*, 3 Sneed, 275; *Rice v. Clark*, 8 Vt. 109; *Hart v. Skinner*, 16 Vt. 138; *Towne v. Wiley*, 23 Vt. 355; *Spencer v. Pilcher*, 8 Leigh, 565; *Harvey v. Epes*, 12 Gratt. 153, acc. *Conf. Maguyer v. Hawthorn*, 2 Harringt. 71, *M'Neill v. Brooks*, 1 Yerg. 73; *Parker v. Thompson*, 5 Sneed (Tenn.), 349. — ED.









## BRISTOL v. BURT.

SUPREME COURT OF JUDICATURE, NEW YORK, NOVEMBER, 1810.

*[Reported in 7 Johnson, 254.]*

THIS was an action of trover, brought to recover the value of ninety-five barrels of potashes. The cause was tried at the Onondaga circuit, the 7th June, 1810, before the Chief Justice.

The defendant was, in 1808, and still is, the collector of the port of Oswego, on the south side of Lake Ontario. In May, 1808, the defendant was applied to, to know whether he would grant clearances for ashes for the port of Sackett's Harbor, which is the next adjoining port in the county of Jefferson, and on the south side of the lake, and adjacent to the province of Canada. The defendant answered that he did and should continue to grant clearances; and the defendant was informed of the intention of the plaintiff to bring ashes to Oswego, for the purpose of sending them to Sackett's Harbor. About the first July, the plaintiff sent ninety-five barrels of potashes to Oswego, which were put into the store of a Mr. Wentworth, who gave the plaintiff a receipt for them. The plaintiff applied to the defendant for a clearance, in order to transport the ashes to Sackett's Harbor; but the defendant refused to grant it, alleging as a reason for his refusal that though he did not suspect the plaintiff intended to send the ashes to a British port, yet he believed that the collector at Sackett's Harbor would not do his duty, and that the ashes would be sent from thence to a British port. The defendant at the same time promised the plaintiff that if he did not receive instructions to the contrary from the Secretary of the Treasury, within a fortnight, he would give a clearance to the plaintiff's ashes. After the expiration of that time, the defendant still refused to grant the clearance, though he admitted that he had received no new instructions from the Secretary of the Treasury, nor had he received any instructions forbidding such clearances. He assigned no other reason for his refusal than his suspicion that the collector at Sackett's Harbor would not do his duty, and persisted in refusing a clearance, though the plaintiff offered to give bonds that the ashes should be delivered at Sackett's Harbor. The plaintiff then expressed his desire to take the ashes up the river; but the defendant declared that the plaintiff should not take them from Wentworth's store, unless he gave bonds for double the value of the property, to carry the ashes to Rome in the county of Oneida, and leave them there, while the embargo continued; that the property was under his jurisdiction and charge; that he had a control over all the stores and



wharves where ashes were placed, and had employed armed men; and that he had the right to prevent their removal, and would exercise it. Two armed men were stationed near Wentworth's store during two nights, and an armed sentinel was constantly on duty, night and day, at the public store of the collector, within ten rods of Wentworth's store, and in view of it, for the purpose of observing boats, and preventing the removal of property. The defendant avowed his determination not to permit any ashes to be removed from any of the stores in Oswego. The defendant demanded the ashes in question from Wentworth, who refused to deliver them; but, in order to prevent the defendant from proceeding to extremities, and to satisfy him, Wentworth entered into an agreement with the defendant not to deliver any property from his store, without the permission of the defendant.

In the autumn of 1808, the defendant gave a general permission to remove any ashes from Oswego up the river, and thirteen barrels of the potash of the plaintiff were delivered by Wentworth to his order.

On the 13th February, 1809, the defendant gave a written permit to carry the remaining eighty-two barrels of potashes from Oswego to Rome, in the county of Oneida, requiring of the person to whom they were delivered by order of the plaintiff a written report of the ashes, and an oath that the statement was true, and that he did not intend to violate the law.

It was proved that, when the plaintiff applied to the defendant for a clearance to Sackett's Harbor, potashes were worth at that place 180 dollars per ton, and that the expense of transportation was 4 dollars per ton. That the price of potashes on the 21st July, 1808, in the city of New York, was 173 dollars per ton, but would not sell at Salina, in the county of Onondaga, for more than 150 dollars. That when the plaintiff received the ashes, the price of them, in the city of Albany, was 137 dollars and 50 cents, and the expense of transportation from 25 to 30 dollars per ton.

The Chief Justice charged the jury, that in his opinion there was sufficient evidence of a conversion by the defendant, and that the plaintiff was entitled to recover for the difference in the value of the ashes at the time when he demanded a clearance, and at the time he received them. And the jury found a verdict for the plaintiff for 1,472 dollars and 20 cents.

A case was made for the opinion of the court, which it was agreed might be turned into a special verdict.

*Gold*, for the plaintiff, cited 6 East, 538; 6 Term Rep. 298; 1 Burr. 31.

*Cady*, contra, cited 5 Bac. Abr. 279, Trover (G); Bull. N. P. 44; 3 Salk. 284.









*Per Curiam.* The only point made in this case is, whether there was sufficient evidence of a conversion to justify the verdict.

There were declarations and acts of the defendant united to form a control over the plaintiff's property. The very denial of goods to him that has a right to demand them, says Lord Holt, in *Baldwin v. Cole*, is a conversion; for what is a conversion but an assuming upon one's self the property and right of disposing of another's goods? And he that takes upon himself to detain another man's goods from him without a cause, takes upon himself the right of disposing of them. The bare denial to deliver is not always a conversion, as in *Thimblethorpe's Case* (cited in 2 Bulst. 310, 314), where a piece of timber was left upon the land of the defendant by the lessee at the expiration of his term, and he was requested to deliver it and refused, but suffered the timber to lie without intermeddling with it. The reason why this was held not to be a conversion was, that there was no act done or dominion exercised; but in the present case there were the highest and most unequivocal acts of dominion and control over the property, not only by claiming jurisdiction over it, but in placing armed men near it, to prevent its removal. This fact is, of itself, a conversion. It is intermeddling with the property in the most decisive manner, and detaining it for months in the storehouse. It was therefore bringing a charge upon the plaintiff; and this, says Mr. Justice Buller, in *Syeds v. Hay*, amounts to a conversion. Neither the case of *M'Combie v. Davies*, nor the anonymous case in 12 Mod. 344, were so strong as this, and yet the conversion was maintained. It was assuming the dominion of the property which was made by Lord Ellenborough the test of the conversion, though the property in that case lay not in the defendant's but in the king's warehouse. The definition of a conversion in trover, as given by Mr. Gwillim, the editor of Bacon, and now a judge in India, applies precisely to this case. 6 Bac. Abr. 677. "The action being founded upon a conjunct right of property and possession, any act of the defendant," says he, "which negatives or is inconsistent with such right, amounts in law to a conversion. It is not necessary to a conversion that there should be a manual taking of the thing in question by the defendant; it is not necessary that it should be shown that he has applied it to his own use. Does he exercise a dominion over it in exclusion or in defiance of the plaintiff's right? If he does, that is, in law, a conversion, be it for his own or another person's use."

We are, therefore, of opinion that the motion to set aside the verdict must be denied.

*Motion denied.*<sup>1</sup>

<sup>1</sup> *Chapman v. Allen*, Cro. Car. 271; *Brenan v. Currint*, Sayer, 224; *Dewell v. Moxon*, 1 Taunt. 391; *Pattison v. Robinson*, 5 M. & Sel. 105; *Wilton v. Girdlestone*,

## NICHOLS v. NEWSOM.

SUPREME COURT, NORTH CAROLINA, JUNE, 1813.

[Reported in 2 *Murphy*, 302.]

THIS was an action of trover for a quantity of lightwood set as a tar-kiln on the defendant's land, but not banked or turfed. Upon the trial it appeared that a judgment had been obtained against the defendant, on which an execution was issued and levied on the said lightwood, which was duly advertised and sold and struck off to the plaintiff as the highest bidder. The plaintiff afterwards applied to the defendant for liberty to bank, turf, and burn the kiln as it then stood, which liberty the defendant refused to grant. The plaintiff then demanded the lightwood, and proposed to bring his team and cart it off the defendant's land; whereupon the defendant replied, if the plaintiff came on his premises for that purpose, he would sue him. There was no evidence of an actual conversion, and at the time the suit was commenced, the kiln remained in the same situation in which it was when purchased by the plaintiff. The plaintiff was permitted to take a judgment for twenty pounds, the value of the kiln, with leave to the defendant to have the verdict set aside and a nonsuit entered, provided the court should be of opinion the plaintiff was not entitled to recover in this action, on the foregoing facts, and on motion of the defendant, the case was transmitted to this court for the opinion of the judges. On this case the court were divided in opinion.

SEAWELL, J. To support an action of trover, it is necessary for the plaintiff to prove property and right of possession in himself and a

5 B. & Ald. 847; *Sharp v. Pratt*, 3 C. & P. 34; *Clendon v. Dinneford*, 5 C. & P. 13; *Cranch v. White*, 1 B. N. C. 414; *Wansbrough v. Maton*, 4 A. & E. 884; *Thompson v. Rose*, 16 Conn. 71; *Clark v. Hale*, 34 Conn. 398; *Maxwell v. Harrison*, 8 Ga. 67; *Hale v. Barrett*, 26 Ill. 195; *Ring v. Billings*, 51 Ill. 475; *Hipple v. De Puis*, 51 Ill. 528; *Nor. Trans. Co. v. Sellick*, 52 Ill. 249; *Pullen v. Bell*, 40 Me. 314; *Neal v. Hanson*, 60 Me. 84; *Buel v. Pumphrey*, 2 Md. 261; *Chamberlin v. Shaw*, 18 Pick. 278; *Magee v. Scott*, 9 Cush. 148; *Folsom v. Manchester*, 11 Cush. 334; *Boston Acid Manuf. Co. v. Moring*, 15 Gray, 211; *Hinckley v. Baxter*, 13 All. 139; *Cox v. Cook*, 14 All. 165; *Bates v. Stansell*, 19 Mich. 91; *O'Donoghue v. Corby*, 22 Mo. 393; *Huxley v. Hartzell*, 44 Mo. 370; *Bradley v. Spofford*, 23 N. H. 444; *Dunlap v. Hunting*, 2 Den. 648; *Farrar v. Chauffetete*, 5 Den. 527; *Hall v. Robinson*, 2 N. Y. 293; *Tuttle v. Gladding*, 2 E. D. Smith, 157; *Solomon v. Waas*, 2 Hilt. 179; *Chambers v. Lewis*, 28 N. Y. 454; *Hare v. Pearson*, 4 Ired. 76; *McDaniel v. Nethercut*, 8 Jones, 97; *Berry v. Vantries*, 12 Serj. & R. 89; *Harger v. M'Mains*, 4 Watts, 418; *Ratcliff v. Vance*, 2 Mill's Const. R. 239; *Fowler v. Stuart*, 1 McCord, 504; *Trowell v. Youmanes*, 5 Strobb. 67; *Roach v. Damron*, 2 Humph. 425; *Irish v. Cloyes*, 8 Vt. 30; *Albee v. Cole*, 39 Vt. 319; *Vilas v. Mason*, 25 Wis. 310, acc. — Ed.











conversion by the defendant. It is admitted in this case that the plaintiff has shown property and a right of possession in himself, but it is insisted by the defendant that he has committed no conversion. This leads to the inquiry, "What is a conversion?" Conversion, in legal acceptation, means the wrongfully turning to one's use the personal goods of another, or doing some wrongful act inconsistent with or in opposition to the right of the owner. It is a malfeasance, and the plea to the action is "not guilty." This malfeasance, like all others, is capable of proof in divers ways, as by the confession of defendant, or when called upon to surrender the property, his refusal affords a presumption that he has converted it to his own use; for otherwise he would not refuse. But this presumption, like all others, vanishes when the contrary appears.

In the present case the plaintiff calls upon the defendant for permission to dig earth and cover the kiln; the defendant refuses, and he not being bound to grant the permission, it is admitted that this refusal does not amount to a conversion. The plaintiff then formally asks a permission which the law had already afforded to him, and which defendant could not abridge or withhold. The defendant refuses and threatens the plaintiff with a suit, in case he should enter upon his premises and take away the lightwood; and the parties, no doubt, believed that it was in law necessary to obtain such permission, to prevent the plaintiff from becoming a trespasser. This menace, it is said, amounts to a conversion, and it is the policy of the law to do away the necessity the plaintiff was reduced to, of taking his property at the risk of a suit though without foundation. However stupid the conduct of the defendant hath been, yet when we recollect that in legal understanding conversion is an act, and that in all instances where the words of a party are given in evidence, it is with a view of inferring such act, it would seem irresistibly to follow that where there is clear evidence that no act has been done, it is equally as clear there has been no conversion. What has the plaintiff to complain of? Has the defendant injured his property? Has he used it in any way, or exercised any act of ownership inconsistent with the plaintiff's right? He has not. He has merely threatened to sue the plaintiff if he took the lightwood away, or entered upon his premises for that purpose, and it is admitted that no such action would lie. How, then, does this differ from a case where one man says to another, "If you plough your own horse, I will sue you for it"? The owner of the horse would incur the same risk, by ploughing him after this menace, that the plaintiff would have incurred by entering upon the defendant's land and taking away the lightwood, and yet it would hardly be said that this menace was a conversion of the horse.

But a case has been cited from 3 Mod. 170, wherein trover for a tree, upon demand and refusal, the plaintiff recovered. When that case is examined, it will turn out to be this: trover was brought for fourteen lemon-trees in boxes, which were placed by the plaintiff in the garden of Lord Brudenell, by his Lordship's consent. The premises were afterwards sold, and after passing through many hands, they came to the defendant, who refused to deliver the lemon-trees to the plaintiff upon request. These trees were placed in a garden which was walled, and which plaintiff could not enter unless defendant would open the gate, and out of which he could take the trees only through the gate. The defendant by his refusal withheld from the plaintiff the enjoyment of his fruit-trees. But it is worthy of notice that the conversion was not made a point in the case. In the present case the lightwood was as accessible to the plaintiff as to the defendant, and has not in any manner been withheld from him.

In 5 Bac. Abr. 279, title Trover, it is stated that a demand and refusal of a piece of timber or other cumbrous article, when it has remained untouched, will not support an action of trover. Independently of this authority, I am of opinion, from the reason of the case, that this action cannot be supported, and that the rule for a new trial should be made absolute.

HALL, J. The lightwood which is the subject-matter of this action was legally levied upon and sold to the plaintiff. That sale gave the plaintiff a title to it. The kiln of lightwood could not be delivered and carried away like most other kinds of personal property; it was cumbrous, and could only be removed in the manner proposed by the plaintiff. If so, he had a right to remove it in that manner, and the defendant had no right to forbid him. Of course the plaintiff's right was not impaired by the defendant's threat to sue him if he entered upon his land and removed the lightwood; his physical power to do himself justice still remained. Had that been opposed, then there would have been a conversion. Had the defendant sued the plaintiff for carrying away the lightwood, he could not have recovered, because the plaintiff only did that which the law gave him a right to do, that was, to enter on the defendant's land and carry away property to which he had acquired a title by a purchase under an execution, property which could be removed in no other way. The threats which defendant made was of no legal significance, and ought to have been disregarded by the plaintiff. If the lightwood had been within the defendant's enclosures, and admittance had been denied, the case might have been different; but being in the woods, and no barrier interposed, the idle threat of defendant could not amount to a conversion, and the rule for a new trial, I think, ought to be made absolute.











LOWRIE, J., delivered the opinion of the majority of the court.<sup>1</sup>

The action of trover is the legal remedy to recover damages for the unlawful conversion of a personal chattel. The lightwood was a chattel of this description, and the purchase under the execution vested in the plaintiff a right to it. The lightwood, however, being bulky, and too cumbrous to be immediately moved from the defendant's land on which it was sold, the law will presume, unless by some express and unequivocal act of the debtor such presumption should be destroyed, that it was left there by his consent and in his possession until the necessary arrangement could be made for taking it away. In all cases where the consent of one man becomes necessary, and without which another cannot conveniently enjoy his property, the law presumes such consent to be given, unless the contrary expressly appears. Whenever, therefore, a man purchases heavy articles at a sheriff's sale, such as corn, fodder, hay-stacks, &c., which it is not presumable he is prepared immediately to take away, he may, if not prohibited by the debtor, return in a peaceable manner and lawfully enter upon the freehold, or into the enclosures of such debtor, or other person on whose land such articles were sold, for the purpose of taking them away. But in the present case such presumption ceased to exist the moment the defendant expressly prohibited the plaintiff from entering upon his freehold, and threatened him with a suit if he did enter. After such express prohibition the entry of the plaintiff could not be a peaceable and lawful one. The law will not permit one man to enter upon the possession of another for the assertion of a mere private right which he may have to an article of personal property, against the express prohibition of him in possession; such permission would be attended with consequences very injurious to the peace of society. We therefore think that the refusal of the defendant, as stated in this case, was such evidence of a conversion as was proper to be left to a jury. The conduct of the defendant reduced the plaintiff to the necessity of asserting his right by an action at law. "If a man give leave to have trees put into his garden, and afterwards refuse to let the owner take them, it will be a conversion." Com. Dig. Action on the Case, title Trover, E. This case differs from that to be found in Gilbert's Law of Evidence, 262, and in 5 Bac. Abr. Trover, B, where there was a refusal to deliver a beam of timber; for here was not only a refusal to deliver, but a refusal to suffer the plaintiff to take the lightwood into his possession and cart it away, coupled with a declaration that, if the plaintiff entered upon his freehold for that purpose, he would sue him. The plaintiff was under no necessity to enter upon the defendant's land, and thereby incur the trouble and expense of a lawsuit. We therefore think the rule for a new trial should be discharged.

<sup>1</sup> Taylor, C. J., Locke, Lowrie, and Henderson.

## JACOBY v. LAUSSATT.

SUPREME COURT, PENNSYLVANIA, DECEMBER, 1820.

[Reported in 6 *Sergeant & Rawle*, 300.]

THIS case came before the court on a motion by the defendant for a new trial, founded upon the admission and rejection of evidence, and the alleged misdirection of Judge Duncan, before whom the cause was tried at *Nisi Prius* on the 29th November, 1820. It was an action of trover for certain goods claimed by the plaintiffs by virtue of a deed from Francis Jacoby, by which he assigned all his property to them in trust for his creditors in the manner specified in the deed. On the trial the evidence was in substance as follows: In the month of September, 1815, Francis Jacoby purchased a quantity of coffee of the defendant, which, together with other goods, he shipped in the ship "Eagle," bound from Philadelphia to Marseilles, and consigned them to Ambrose Laussatt, nephew of the defendant, who went out supercargo of the "Eagle." Ambrose Laussatt was ordered by Francis Jacoby's letter of instructions to sell the goods on his arrival at Marseilles, and invest the proceeds in silks; but there was nothing said as to the manner of sending the silks to Philadelphia, or as to the person to whom they were to be consigned. Ambrose Laussatt sold the coffee, &c., at Marseilles, invested the proceeds in silks as ordered, and sent them to Philadelphia by the same ship, consigned to the defendant on account of Francis Jacoby. Some days after the arrival of the ship at Philadelphia, Lewis Neill, one of the plaintiffs, and Thomas Deihl, agent of Leonard Jacoby, another of the plaintiffs, called on the defendant and demanded the goods which were shipped on account of Francis Jacoby. The defendant refused to deliver them, alleging that Francis Jacoby was in debt to him for the coffee, and that there was an agreement that the goods should be consigned to him. No further conversation passed, nor did the plaintiffs make any other demand before the commencement of this suit.<sup>1</sup>

The judge charged the jury that the demand and refusal which had been proved were sufficient evidence of a conversion by the defendant. The jury found for the plaintiffs, with damages, according to the charge of the court.

*Phillips* and *C. J. Ingersoll*, in support of the motion for a new trial.

Trover cannot be maintained unless the plaintiff has the right of possession, nor without proving a wrongful conversion by the defend-

<sup>1</sup> See *supra*, p. 393, note 2. — Ed.









ant, which the evidence given on the trial does not show. Ambrose Laussatt had received no instructions from Francis Jacoby to whom to remit the home cargo, and had, therefore, a right to consign it to whom he thought proper. Indeed, it was his duty, in the absence of instructions from the shipper, to consign it to the defendant, who was owner of the ship. The plaintiffs, seeing some bales marked with the initials of Francis Jacoby, went to the defendant for information, and on being told that he had a lien on the goods, went away satisfied, and made no other demand prior to the commencement of the suit. The detention of the goods, therefore, was not wrongful nor in opposition to the plaintiffs' demand, since they acquiesced in the reasons given for it. The law will not, in such a case, infer a conversion. To support trover there must be a positive tortious act. *Bromley v. Coxwell*; <sup>1</sup> *Solomons v. Dawes*; *Isaac v. Clark*.<sup>2</sup>

*Chauncey*, for the plaintiffs, was relieved by the court from arguing the question of conversion.

TILGHMAN, C. J., after recapitulating the facts, delivered the opinion of the court as follows:—

Then, as to a demand and refusal, they were both positively proved by the oath of Mr. Deihl, and I consider the law as very clear that, in general, a demand and refusal being proved, the jury ought to infer a conversion. There are, indeed, exceptions to this general rule, some of which appear in the cases which were cited on the part of the defendant. If one is in possession of goods which he has found and does not claim, and a demand being made by the owner the possessor answers that he is not satisfied of that person's being the owner, but he is ready to deliver the goods on receiving reasonable proof of ownership, this is not such a denial as will warrant the inference of conversion. On the contrary, it is such an answer as a prudent man, consulting the interest of the true owner, ought to give. So if one who calls himself the agent of the owner demands the goods, and the possessor answers that he cannot deliver them until he receives proof that he is really the agent, no conversion can be inferred, because the answer shows nothing like an intent to convert, but only a design to preserve the goods for the use of the owner. But in the present case the defendant refused to deliver the goods because he claimed them as his own, or, at least, he claimed a special property adverse to the general property of the plaintiffs. It appears to me that such a refusal falls within the general rule, and is sufficient evidence of a conversion.

*New trial refused.*

<sup>1</sup> 2 Bos. & Pull. 438.

<sup>2</sup> 2 Bulst. 812.



## WILLIAMS AND CHAPIN v. MERLE.

SUPREME COURT OF JUDICATURE, NEW YORK, OCTOBER, 1833.

[Reported in 11 *Wendell*, 80.]

THIS was an action of trover, tried at the New York circuit in October, 1831, before the Hon. Ogden Edwards, one of the circuit judges.

About the first of November, 1829, the master of a tow-boat took by mistake four barrels of potashes from the warehouse of the plaintiffs, who, and the owners of the tow-boat, occupied the same building in Albany. The master, on his arrival in New York, having discovered the mistake, delivered the articles to a clerk of the agents of his principals, who said he would take the ashes to an inspector's office and advertise them. The clerk accordingly took them to an inspector's office on the 3d of November, obtained a certificate of inspection, and on the 6th of November sold the ashes to the defendant, a produce broker, who purchased them for a Mr. Paterson for a fair price, and received the inspector's certificate. On the 10th of November the defendant took the ashes from the inspector's office, and shipped them to the order of his principal. About the 1st of September, 1830, the plaintiffs demanded the ashes of the defendant, who refused to account for them, saying he had purchased and paid for them a year preceding the demand. The judge intimated his opinion that if the defendant had acquired the ashes *bona fide* by purchase in the regular course of his business as a broker, and had disposed of them *bona fide*, pursuant to the instructions of his principal before suit brought, that the action would not lie; he, however, refused to nonsuit the plaintiffs, and the jury, under his direction, found a verdict for the plaintiffs for the value of the ashes and the interest thereof, reserving the question as to the plaintiffs' right to recover for the opinion of this court.

*S. Stevens*, for the plaintiffs. *C. Graham* for the defendant.

By the court, SAVAGE, C. J. The question is, whether the plaintiffs are entitled to recover upon the facts of this case. That they had title to the property does not admit of dispute. Has that title been transferred to the defendant, and in what manner? The owner of property cannot be divested of it but by his own consent, or by operation of law. Morgan, who took the property by mistake, certainly acquired no title. Shankland (the clerk) surely had no title. If the defendant has title, it comes to him from a person who had none. In the language of Mr.









Justice Sutherland, in *Everett v. Coffin*,<sup>1</sup> "The disposing or assuming to dispose of another man's goods, without his authority, is the gist of this action; and it is no answer for the defendants that they acted under instructions from another, who had himself no authority." This same principle was asserted by this court in *Prescott v. Deforest*,<sup>2</sup> where it was held that a landlord who distrained and sold the goods of his tenant conveyed no title to the purchaser, the distress being unauthorized. The court said, that if Satterlee (the landlord) had no right to distrain and sell the goods, it necessarily follows that the defendant, though a *bona fide* purchaser for valuable consideration, acquired no title. So far, then, as the defendant's title depends upon the purchase by him in good faith, and for valuable consideration, it is still without foundation so long as the seller had neither title nor authority to sell. The owners were not in fault; the property was taken without their consent or knowledge. The maxim *caveat emptor* applies; the purchaser must look to the seller for indemnity.<sup>3</sup>

The defendant stands in no better situation than any other who purchases an article from a party without title or authority to dispose of such article; in such case the purchaser acquires no title. The true owner has a right to reclaim his property and to hold any one responsible who has assumed the right to dispose of it.

The plaintiffs are therefore entitled to judgment upon the verdict.<sup>4</sup>

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### STEVENS v. CURTIS.

SUPREME JUDICIAL COURT, MASSACHUSETTS, SEPTEMBER TERM,  
1836.

[Reported in 18 *Pickering*, 227.]

In this case it was resolved, that if a man finds stray cattle in his field, he is not bound to impound them or retain them for the owner, but may drive them off into the highway, without being guilty of a conversion.<sup>5</sup>

<sup>1</sup> 6 Wendell, 609.

<sup>2</sup> 16 Johns. R. 159.

<sup>3</sup> See *supra*, p. 393, note 2. — ED.

<sup>4</sup> *Lee v. Mathews*, 10 Ala. 682, acc. — ED.

<sup>5</sup> *Wilson v. McLaughlin*, 107 Mass. 587, acc. — ED.

## TRAYLOR AND ANOTHER v. HORRALL.

SUPREME COURT, INDIANA, AUGUST 22, 1837.

[Reported in 4 *Blackford*, 317.]

ERROR to the Daviess Circuit Court.

BLACKFORD, J. Trover by Horrall against Traylor, Capehart, and Cain. Plea: Not guilty. The only evidence respecting the conversion was as follows: The plaintiff had put his corn into a crib, which he had hired for the purpose of Kinman, and which stood on Kinman's land. The defendants and some other persons being present where the crib of corn was, Capehart offered the corn at public sale, and Traylor bid it off at the price of thirty-one dollars. Cain said that he had the officers bound for his money. The plaintiff was also present, and forbid any person from selling or removing the corn, claiming it to be his. Cain afterwards said that he had got his money from Capehart. The defendants demurred to the evidence, and agreed that, if judgment were rendered for the plaintiff, the court might assess the damages. The demurrer was sustained as to Cain, but there was a judgment against the other defendants for seventy-four dollars in damages, together with costs.

We are satisfied that the record shows no evidence conducing to prove a conversion in this cause, and that the judgment for the plaintiff is consequently erroneous.

To support the action of trover, there must be proof of property in the plaintiff, possession to have been in the defendant, and a conversion by the defendant. Buller's N. P. p. 33. The gist of the action is the conversion; and unless the defendant has had an actual or virtual possession of the goods, he cannot be charged with a conversion of them to his own use.

In the present cause it does not appear why the form of a public sale of the corn in question took place. It is not shown that Capehart, the alleged seller, had seized the property under any process of law, or that at the time of the sale, or at any other time, he had or pretended to have any possession of it whatever. Neither was there any attempt to prove that Traylor, the purchaser, ever took possession of the property, or exercised any act of ownership over it.

The case of *Bristol v. Burt* is referred to by the plaintiff. But the court there expressly say that the defendant had exercised the highest and most unequivocal acts of dominion and control over the goods, not only by claiming jurisdiction over them, but by placing armed men near them to prevent their removal. They say, further, that the











defendant thus detained the goods for several months, and that a charge was therefore brought upon the plaintiff. The court, in that case, do not appear to have had any idea that the suit could be maintained without showing that the defendant had intermeddled with the goods, and had for a time excluded the plaintiff from their possession. They rely on *Baldwin v. Cole*. The plaintiff had there sent his servant with some tools to work in the queen's yard for hire. The plaintiff, some time afterwards, having taken away his servant, sent for the tools, but the defendant refused to deliver them up. Trover was then brought for the tools, and the action was sustained on the ground that, as the defendant had wrongfully undertaken to detain them, he took upon himself the right to dispose of them, which was a conversion. The case in 6 Mod. Rep. is settled law, and being relied on in *Bristol v. Burt*, it shows the ground upon which the latter case was intended to be placed by the court.

In *M'Combie v. Davies* the plaintiff, by his agent, bought some tobacco which was in the king's warehouse; but the agent took the transfer of the tobacco on the warehouse books in his own name. The agent afterwards pledged the tobacco in his own name with the defendant, and transferred it into the defendant's name on the books in the warehouse. The plaintiff demanded the tobacco of the defendant, who refused to deliver it up until the debt for which it was pledged should be paid. The plaintiff then sued the defendant in trover for the tobacco. It was strongly contended at the trial that there had been no conversion; and the plaintiff was nonsuited. The nonsuit, however, was subsequently set aside and the plaintiff recovered. In that case the defendant, by the transfer to him on the dock books, had the virtual possession and exclusive control of the property, and he wrongfully refused to deliver it to the rightful owner.

In a subsequent case, Chief Justice Best took occasion to say that Lord Ellenborough, in *M'Combie v. Davies*, had gone to the extreme verge of the law; that as far as that he should go himself; but that in the case before Lord Ellenborough the state of the property was changed, because there had been a transfer in the dock books, which, it was well known, is as much a transfer for the purposes of trade, as an actual removal from one warehouse to another; and that there was, in that case, the exercise of dominion over the goods. *Mallalieu v. Laughter*.

The cause which we are now to decide is very different from any of those to which we have referred. For any thing that the record before us presents, the plaintiff may have always continued in the undisturbed possession of the corn in the place where he originally deposited it, or he may have sold it, or have otherwise converted it to his own use.

DEWEY, J., having been concerned as counsel in the cause, was absent.

*Per Curiam.* The judgment, &c., against the plaintiffs in error is reversed with costs. *Cause remanded, &c.*<sup>1</sup>

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### HOFFMAN v. CAROW.

SUPREME COURT OF JUDICATURE, NEW YORK, JULY, 1838.

[Reported in 20 Wendell, 21.]

ERROR from the Superior Court of the city of New York. CAROW brought an action of trover against Hoffman & Co., auctioneers in the city of Baltimore, for a quantity of merchandise, stolen from him in the city of New York, and forwarded by the thief to the defendants in Baltimore, to be sold at auction. The defendants, without notice of the theft, sold the merchandise, and paid over the proceeds to the thief; and they insisted, in their defence, that, having done it in good faith, in the ordinary course of their business, they ought not to be held liable, and that the plaintiff should be nonsuited. The court refused to grant a nonsuit, and charged the jury that the plaintiff was entitled to recover. The defendants excepted: The jury found a verdict for the plaintiff, upon which judgment having been entered, the defendants sued out a writ of error.

*D. B. Ogden*, for the plaintiffs in error. *J. Anthon*, for the defendant in error.

By the court, NELSON, C. J. There can be no doubt that the felon did not acquire any title to the goods in question, and could not transfer title even to a *bona fide* purchaser. 8 Cowen, 240; 14 Wendell, 34. An exception to this general rule exists in England, in respect to sales made in market overt, but which has no application here.

It is supposed the action will not lie against the defendants below, because the property was not found in their possession; and that the owner must follow and demand it of the person in whose possession it may be found. It is difficult to perceive any well-founded distinction between the two cases, in respect to the liability of the parties; both have assumed and exercised a control over the property without right or authority, and the hardship of responding in damages is as great to one as to the other. Both lose the value of the property which they honestly purchased and paid for. This distinction was disregarded in

<sup>1</sup> Cuckson v. Winter, 2 Man. & Ry. 313; Herron v. Hughes, 25 Cal. 555, acc.—ED.











Williams & Chapin v. Merle. The owner is not in fault, as the property was taken without his knowledge or consent; and as between him and any other person, he presents both legally and equitably the higher and better title.

*Judgment affirmed.*<sup>1</sup>

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THURSTON ET AL. v. BLANCHARD.

SUPREME JUDICIAL COURT, MASSACHUSETTS, MARCH TERM, 1839.

[Reported in 22 Pickering, 18.]

TROVER to recover the value of certain goods alleged to have been obtained by the defendant from the plaintiffs by means of false and fraudulent pretences.

The trial was before Putnam, J. It appeared that the goods were purchased of the plaintiffs by the defendant, by means of false representations, on or about the 22d day of March, 1837, for the sum of \$677.77; that the defendant gave his negotiable promissory note for the amount, payable in six months; that such note had been in the possession of the plaintiffs ever since it was given; that they had never offered to give it up to the defendant; and that they had not made a demand upon him for the goods before commencing this suit. The plaintiffs, however, produced the note in court at the trial, and there offered to give it up, or to put it on the files of the court; but the defendant declined taking it, and it was placed on the files.

The defendant offered no evidence in his defence, but relied upon the facts that the note had not been given up or tendered to him by the plaintiffs, and that no demand had been made upon him for a return of the goods.

A verdict was taken for the plaintiffs by consent.

If the court should be of opinion that the action could be maintained, judgment was to be rendered on the verdict; otherwise, the plaintiffs were to be nonsuited.

*Choate* and *S. Parker* for the defendant.<sup>2</sup> Under our law a demand of the goods was necessary on the part of the plaintiffs. The sale was

<sup>1</sup> Affirmed in 22 Wendell, 285; *Hardman v. Booth*, 1 H. & C. 803; *Perminter v. Kelly*, 18 Ala. 716; *Rogers v. Huie*, 1 Cal. 429; *Pool v. Adkisson*, 1 Dana, 110; *Kimball v. Bilings*, 55 Me. 147; *Coles v. Clark*, 3 Cush. 399; *Koch v. Branch*, 44 Mo. 542; *Everett v. Coffin*, 6 Wend. 603; *Anderson v. Nicholas*, 5 Bosw. 121; *Dudley v. Hawley*, 40 Barb. 397, acc.; *Rogers v. Huie*, 2 Cal. 571; *Spooner v. Holmes*, 102 Mass. 502 (*semble*), *contra*. — ED.

<sup>2</sup> See *supra*, p. 393, note 2. — ED.

voidable and not void, even if the evidence proved that the goods were obtained under false pretences. The title therefore passed, voidable only at the election of the vendor. *Rowley v. Bigelow*; <sup>1</sup> *Somes v. Brewer*; <sup>2</sup> *McCarty v. Vickery*; <sup>3</sup> *Brown on Sales*, 417.

*W. J. Hubbard and Watts*, for the plaintiffs. It was not incumbent on the plaintiffs to make a formal demand on the defendant for the goods, before bringing his action, the original taking being tortious. *Buller's N. P.* 44; *Lamb v. Clark*; <sup>4</sup> *Woodbury v. Long*; <sup>5</sup> *Bates v. Conkling*; <sup>6</sup> *Seaver v. Dingley*; <sup>7</sup> *Saund. on Pl. & Evid.* 881; *Bristol v. Wilsmore*.<sup>8</sup>

SHAW, C. J., delivered the opinion of the court. We are now to take it as proved in point of fact, to the satisfaction of the jury, that the goods, for which this action of trover is brought, were obtained from the plaintiffs by a sale, but that this sale was influenced and effected by the false and fraudulent representations of the defendant. Such being the case, we think the plaintiffs were entitled to maintain their action, without a previous demand. Such demand, and a refusal to deliver, are evidence of conversion when the possession of the defendant is not tortious; but when the goods have been tortiously obtained, the fact is sufficient evidence of conversion. Such a sale, obtained under false and fraudulent representations, may be avoided by the vendor, and he may insist that no title passed to the vendee, or any person taking under him, other than a *bona fide* purchaser for value and without notice, and in such case the seller may maintain replevin or trover for his goods. *Buffinton v. Gerrish*.<sup>9</sup>

*Judgment on the verdict for the plaintiffs.*<sup>10</sup>

<sup>1</sup> 12 Pick. 307.

<sup>2</sup> 2 Pick. 191.

<sup>3</sup> 12 Johns. R. 348.

<sup>4</sup> 5 Pick. 193.

<sup>5</sup> 8 Pick. 543.

<sup>6</sup> 10 Wendell, 391.

<sup>7</sup> 4 Greenl. 318.

<sup>8</sup> 1 Barn. & Cress. 514.

<sup>9</sup> 15 Mass. R. 156.

<sup>10</sup> *Stevens v. Austin*, 1 Metc. 557; *Salisbury v. Gourgass*, 10 Metc. 442; *Cary v. Hotelling*, 1 Hill, 311; *Ladd v. Moore*, 3 Sandf. 589; *Bowen v. Fenner*, 40 Barb. 383; *Yeager v. Wallace*, 57 Pa. 365; *Gage v. Epperson*, 2 Head, 669, acc. But see, per Parke, B., *Powell v. Hoyland*, 6 Ex. 71, 72. "We also think there was no evidence in the original transaction of any fraud committed by the defendant, so as to enable the plaintiff to recover upon that ground; that is, supposing that if the goods were obtained by fraud, an action of trespass would lie for taking them, which is a very doubtful matter. My impression is, it would not, because fraud does transfer the property, though liable to be divested by the person deceived, if he chooses to consider the property as not having vested." — Ed.









## LEONARD v. TIDD.

SUPREME JUDICIAL COURT, MASSACHUSETTS, OCTOBER TERM, 1841.

[*Reported in 3 Metcalf, 6.*]

TROVER for a gun, alleged to have been converted by the defendants, on the 9th of December, 1839.

At the trial in the Court of Common Pleas, it was proved that the gun was the property of the plaintiffs. Evidence was introduced tending to show that Jerry Leonard, a person employed in the plaintiff's service, was in the habit of using the gun, and that he frequently offered to sell it; that he was indebted to the defendants, who were partners in trade, and left the gun in their hands, in October, 1839, as security for the debt; that, during the same month, he sold and delivered the gun to Allen Pratt, who has ever since retained the same; and that the plaintiffs, on the 10th of December, 1839, demanded the gun of Tidd, one of the defendants.

The evidence, as to the said sale, tended to prove "that the bargain for the gun was made between said Jerry and Pratt, at the defendants' house; that Jerry wished Pratt to buy the gun and pay five dollars for it to the defendants, to which Pratt assented, if the defendants would take him as paymaster for that sum; that Jerry thereupon asked Clapp, one of the defendants, if he would take Pratt as paymaster for five dollars towards the sum which Jerry owed the defendants, and for which the gun was pledged to them, and that Clapp agreed so to do; and that Jerry thereupon took the gun from a room in the defendants' house and delivered it to Pratt."

The plaintiffs did not rely upon their demand of the gun to charge the defendants with a conversion, but upon the sale thereof made to Pratt. The defendants contended, that if said sale were made by their permission, yet that they could not be charged in trover, inasmuch as the gun was put into their hands by said Jerry, who was in possession thereof, and they supposed it to be his property, and parted with it on the belief that he had a right to dispose of it. But the court ruled otherwise. The defendants' counsel requested the court to instruct the jury, "that if the defendants did nothing towards the sale, except to assent to it so far as to agree to accept, in pay for their claim against Jerry, the sum for which he sold the gun, it would not be a conversion. But the court ruled that it would be a conversion." The jury found a verdict for the plaintiffs, and the defendants alleged exceptions to the ruling of the court.

*Washburn*, for the defendants. *Merrick*, for the plaintiffs.



WILDE, J. The only question in this case is, whether the facts proved at the trial do in law constitute a conversion, as charged in the writ. The case is trover for the conversion of a gun, which the defendants admit was the property of the plaintiffs. It was proved that one Jerry Leonard, being indebted to the defendants, delivered the gun to them as security for the debt, and that afterwards the plaintiffs demanded the gun of one of the defendants. But the plaintiffs do not rely on this demand as evidence of a conversion; as the gun, before the demand, had been taken away by said Jerry, with the defendants' consent, and had been sold by him to one Pratt. The only evidence relied on to prove a conversion by the defendants, is the proof that this sale was made with their consent. It was proved that the bargain for the gun was made between the said Jerry and Pratt, and that Pratt agreed to purchase the gun for the sum of five dollars, to be paid to the defendants, if they would consent to take him as paymaster; to which the defendants assented. There was no proof that the defendants had any knowledge that the gun was the plaintiffs' property, or any reason to suppose that it was not the property of Jerry. But it was ruled by the court that this sale, with the permission of the defendants, would be a conversion by them, although they supposed that the gun belonged to Jerry at the time. It is now contended by the plaintiffs' counsel, that the jury had a right to infer from the evidence that the defendants joined in the sale; but we think no such inference can be made; and it is not to be supposed that it was made by the jury. For it was ruled by the court that the assent to the sale by the defendants, and their agreeing to receive the purchase-money, would amount to a conversion. The only evidence against the defendants was, that they received the gun as a pledge from Jerry, and afterwards restored it to him and took other security, and that the gun was sold by Jerry.

The receiving of the gun from the person who had the possession, and restoring it to him, under the circumstances proved, cannot be considered as a tortious act, and does not amount to a conversion. We think, therefore, on the evidence reported, this action cannot be maintained.

*New trial ordered.*<sup>1</sup>

<sup>1</sup> Nelson v. Iverson, 17 Ala. 216; Hill v. Hayes, 38 Conn. 532; Parker v. Lombard, 100 Mass. 405 acc. — Ed.









## WELLINGTON v. WENTWORTH.

SUPREME JUDICIAL COURT, MASSACHUSETTS, OCTOBER TERM,  
1844.[*Reported in 8 Metcalf, 548.*]

TROVER for a cow. The parties submitted the case to the decision of the court on the statement of facts which follows:—

The defendants, inhabitants of Canton, in this county, being owners of pasture lands in New Hampshire, in May or June of each year, drive their own cattle to said lands, and also drive others' cattle, which they take to pasture at an agreed price, and in each autumn drive them back. In May or June, 1842, the defendants were jointly driving 151 head of cattle, of their own and of their neighbors', along the highway in Dorchester, where the plaintiff resides, and the plaintiff's cow unperceived by the defendants, and temporarily running at large in said highway, without a keeper, joined the cattle aforesaid, without the knowledge of the defendants. The defendants first stopped, at night, at Lexington, counted their drove, and found they had precisely the number they started with. They therefore supposed that they had all, and no more than their own and their neighbors' cattle, which they had taken to pasture. In fact, however, the defendants had lost one cow from their drove as they passed through Milton, but did not discover the loss until their return from New Hampshire. The plaintiff's cow was pastured in New Hampshire, by the defendants, during the season of 1842; and in the autumn of that year, as the defendants returned with their drove, they returned the plaintiff's cow to him, and he then received her. During said pasturing season, said cow had a calf, which was returned to the plaintiff with the cow.

The defendants, when they found the cow which was lost from their drove, as aforesaid, supposed that some one of their neighbors had turned in one more cow than was reported, and never suspected that they had in their drove any cow that was not delivered to them to be pastured, until about four weeks after their return from New Hampshire, when the plaintiff called on them, at Canton, to make inquiries, and demanded his cow.

Defendants to be defaulted, if the plaintiff is entitled to maintain his action on the foregoing facts; otherwise, the plaintiff to become nonsuit.

*E. Ames*, for the defendants. A refusal to deliver goods to the owner, on his demand, is not a conversion, if the party has it not in his power to deliver them, or if he has reasonable cause to doubt the own-

ership of the person making the demand. *Smith v. Young*; *Isaack v. Clark*; <sup>1</sup> *Robinson v. Burleigh*; <sup>2</sup> *Alexander v. Southey*; *Solomons v. Dawes*; *Verrall v. Robinson*.<sup>3</sup> The facts do not show that the plaintiff, when he demanded the cow at Canton, gave the defendants any proof or notice that the cow was his; and they were not bound to go to New Hampshire and return the cow to the plaintiff, on his merely making "inquiries" and a demand, they having been guilty of no tort or negligence.

No counsel appeared for the plaintiff.

SHAW, C. J. The court can perceive in this case no proof of a conversion. There was certainly no unlawful taking of the cow. On the contrary, it was the plaintiff's own fault that his cow was at large in the highway, and entered the defendant's drove. *Rev. Sts. c. 19, § 22*; *Wild v. Skinner*.<sup>4</sup> Nor can we perceive any evidence of a conversion by a refusal to deliver the cow upon demand. For ought that appears, the cow was delivered on the first notice of the plaintiff that she was his property, and request to deliver her up; and we are to consider that such was the fact.

*Plaintiff nonsuit.*<sup>5</sup>

## MORSE v. CRAWFORD.

SUPREME COURT, VERMONT, MARCH TERM, 1845.

[*Reported in 17 Vermont, 499.*]

TROVER for one ox. Plea, the general issue, and trial by the jury.

On trial it was conceded by the defendant, that, previous to May, 1844, the plaintiff delivered to the defendant a pair of oxen, to be kept by the defendant and worked sufficient to pay for their keeping, and that, on or about the tenth day of May, 1844, the defendant killed one of the oxen while at work with them, by putting a cord around his neck and strangling him.

The defendant's counsel then introduced testimony tending to prove that the defendant, about thirty years ago, was insane, and that he had been insane at intervals ever since, and that he was insane at the time the oxen were delivered to him by the plaintiff, and also at the time he killed the ox, and that this was known to the plaintiff. The defendant's counsel then proposed to inquire of the witnesses who were

<sup>1</sup> 2 *Bulst.* 312.

<sup>2</sup> 5 *N. H.* 225.

<sup>3</sup> 2 *C., M. & R.* 495.

<sup>4</sup> 23 *Pick.* 251.

<sup>5</sup> *Van Valkenburg v. Thayer*, 57 *Barb.* 196, *acc.*; *Platt v. Tuttle*, 23 *Conn.* 233, *contra.* See *Hills v. Snell*, 104 *Mass.* 173; *Lee v. McKay*, 3 *Ired.* 29. — *Ed.*











acquainted with the defendant and had conversed with him, their opinion as to his insanity; to this the plaintiff objected, for the reason that the witnesses were not professional men, and had no skill in such matters, and the testimony was excluded by the court.

The defendant's counsel requested the court to charge the jury that, if they found that the defendant was insane generally, and that the plaintiff suffered the oxen to go into his possession voluntarily, knowing that he was insane, and that he killed the ox as the testimony tended to show, the plaintiff was not entitled to recover; and that, if they found that the defendant had been insane at intervals for the last thirty years, and had lucid intervals, the burden of proof was upon the plaintiff to show that the defendant killed the ox in a lucid interval.

The court instructed the jury, that, if the plaintiff delivered the oxen to the defendant when he was insane, and this known to the plaintiff, and that the defendant was insane at the time he killed the ox, the plaintiff was not entitled to recover, but that the burden of proof was upon the defendant to show that, at the time of killing the ox, he was insane.

The jury returned a verdict for the plaintiff. Exceptions by defendant.

*A. Underwood*, for defendant.<sup>1</sup> The burden of proof, we insist, is upon the plaintiff to show that defendant was sane at the time of doing the act which caused the death of the ox. "*Semel furibundus, semper furibundus præsumitur.*" 3 Stark. Ev. 1702, 1703; *Att'y-General v. Parnter*, cited in note to *ib.*

*Farr* and *Leslie* for plaintiff. Insanity is no defence to an action of this kind; for, if proved, it only goes to the intention with which the act is done, or to show that it was done without any intent in law. But in this action the intention is immaterial. The defendant would be equally liable if he killed the ox by mistake, or without designing so to do, as by accident. 1 Chit. Pl. 65; 5 Bac. Abr. tit. Trespass, G, 184; 4 Bl. Comm. 25, note 5; 3 Bac. Abr. 86; 2 Saund. Pl. & Ev. 650; 14 Mass. 207; Ray's Med. Jur. of Insanity, 237, 238; 1 Sw. Dig. 531; *Brown on Actions at Law*, 218.

That the plaintiff bailed the ox to the defendant, knowing him to be insane, can make no difference, if true; no contract was made about killing the ox, nor would any action on contract be the proper action in this case.

The opinion of the court was delivered by

BENNETT, J. No question was made on the trial in regard to the

<sup>1</sup> A portion of the case relating to a question of evidence has been omitted. — Ed.

ownership of the ox, or as to the fact that he was killed by the defendant. The oxen, it seems, were bailed by the plaintiff to the defendant, to be used by him to pay for their keeping, and it appears that, while the defendant had them in his possession under this contract, he destroyed one of them by strangling him.

The defence was put upon the ground that the defendant was insane, both at the time of the bailment and also at the time he killed the ox, and that the plaintiff knew of his insanity when he bailed him the oxen. Can such a defence avail the defendant?

It is a common principle that a lunatic is liable for any tort which he may commit, though he is not punishable criminally. When one receives an injury from the act of another, this is a trespass, though done by mistake, or without design. Consequently, no reason can be assigned why a lunatic should not be held liable. The fact that the plaintiff might have known that the defendant was insane, when he let him have the oxen, cannot toll his right of action. To give to it that effect, it would be necessary to infer from it the plaintiff's assent to the trespass. Though this might evince a want of prudence in the plaintiff, in intrusting his oxen in such hands, yet it is no evidence tending to prove his assent to their destruction. It is possible that, if the evidence had shown that the plaintiff had bailed the oxen to an insane man, under an expectation that he might destroy them, so as to charge himself in trespass for their value, the rule might have been different. There might have been some little plausibility in claiming that this was equivalent to an assent, on the part of the plaintiff, to the trespass.

No sound objection can be urged against this form of action, as arising from the contract of bailment. It must, at all events, have been determined by the tortious act of the defendant.

As it appears from the whole case that the plaintiff is entitled to judgment, the judgment of the County Court is affirmed.

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## BURDITT AND ANOTHER v. HUNT AND ANOTHER.

SUPREME JUDICIAL COURT, MAINE, JULY TERM, 1845.

[*Reported in 25 Maine Reports, 419.*]

TROVER for certain goods. The plaintiffs, to show title in themselves, offered a mortgage from Robert Kellen to them, without date, recorded Feb. 1, 1842, of "all and singular the goods, wares, and











merchandise, stock, harness work, and other articles of every kind and description now in the shop occupied by me in said Bangor." The plaintiffs then introduced the subscribing witness to the mortgage, and proposed to prove by him that the mortgage was executed and delivered on Feb. 1, 1842. To this the defendants objected; but the testimony was admitted by Tenney, J., presiding at the trial.

It appeared from the evidence that the property was left in the possession of Kellen, the mortgagor with authority to sell as agent for the plaintiffs, for cash and in small parcels. The sale of part of these goods by Kellen to Hunt, under which he claimed, was not within the authority, and the plaintiffs refused to ratify it. The exceptions state that it was contended on the part of McMullen, the other defendant, that he, as servant of Hunt, ignorant alike of the existence of the mortgage and of the terms of the contract of sale by Kellen to Hunt, and of any circumstances tending to show that the sale was invalid, was sent by Hunt to bear the articles from Kellen's shop to Hunt's; that as Hunt's servant he received them from Kellen, and deposited them in Hunt's shop, and had no further connection with them; and that therefore he was not liable to the plaintiffs in this action. The exceptions also state that there was evidence in the case tending to sustain McMullen's position.

The presiding judge instructed the jury that the mortgage vested in the plaintiffs title to all the goods in Kellen's shop on the first day of February, and that if Hunt was liable in this action, and McMullen as his servant aided him in removing the goods, then McMullen was liable for all the goods he so removed.

The verdict was for the plaintiffs, and the defendants filed exceptions.

*Rowe* argued for the defendants.<sup>1</sup> The action cannot be supported against McMullen. The articles were left by the plaintiffs in the possession of Kellen, and he delivered them to McMullen, to be carried to Hunt's store. He was a mere carrier from one shop to another. This is no conversion by him.

*Robinson*, for the plaintiffs, contended that Hunt was a wrong-doer, and the other defendant aided him in the commission of the wrongful act, and is therefore equally liable.

The opinion of the court was drawn up by

SHEPLEY, J. The goods having been left in the possession of the mortgagor with authority to sell them for cash in small parcels, he sold and delivered those for which this action was brought to the defendant Hunt; but in so doing exceeded his authority. There was testi-

<sup>1</sup> See *supra*, p. 393, note 2. — ED.

mony tending to prove that the other defendant, McMullen, as the servant of Hunt, was sent for them, and that he received them by the delivery of the mortgagor, and deposited them in Hunt's shop; that he was ignorant of the existence of the mortgage and of the terms of the sale to Hunt; and that he had no other connection with them.

The jury were instructed if Hunt was liable, and McMullen, as his servant, aided him in removing the goods, he would be liable for those which he removed. A servant, who receives goods delivered to him and carries and delivers them to his master, can be held responsible for them in action of trover only, on the ground that such a removal of them amounts to a conversion. If such a position could be maintained, common carriers and other persons, by receiving goods delivered to them by a person in possession of them, and carrying them to another place, would thereby be made liable for their value, if it should afterward be made to appear that the goods were delivered without authority from the owner. And yet the possession of personal property is *prima facie* evidence of ownership. Such a position cannot, however, be sustained. Conversion is the gist of the action of trover, and conversion is a tort. *Draper v. Fulkes*; *Fuller v. Smith*.<sup>1</sup> When goods come to the possession of a person by delivery or by finding, he is not liable in trover for them without proof of a tortious act. *2 Saund. 47 e*; *Mulgrave v. Ogden*.

The reception of them by delivery from one whom he is entitled to regard as the owner, and the conveyance from him to another, to whom they are sent, are not tortious acts. In the case of *Parker v. Godin*, the defendant, who acted as the friend or servant of another, was held liable in such an action, because he pawned the goods in his own name, which had been improperly delivered to him. In the case of *Perkins v. Smith*, a bankrupt after the act of bankruptcy delivered goods to a servant to be carried to his master, and the servant sold them for his master's use, and was held to be liable for them in such an action. In both these cases the servant was considered to be liable only on the ground that they committed tortious acts by pawning and selling the goods. A refusal to deliver goods on a demand made by the owner may be a tortious act and a conversion by one who is in possession of them. There is no evidence exhibited in this case tending to prove that the servant committed any tortious act, or that he assisted his master in such an act.

*Exceptions sustained, and new trial granted.*<sup>2</sup>

<sup>1</sup> 3 Salk. 366.

<sup>2</sup> See *Freeman v. Scurlock*, 27 Ala. 407; *Strickland v. Barrett*, 20 Pick. 415; *Deering v. Austin*, 34 Vt. 330. — ED.









## RILEY AND ANOTHER v. THE BOSTON WATER-POWER COMPANY AND OTHERS.

SUPREME JUDICIAL COURT, MASSACHUSETTS, MARCH TERM, 1853.

[Reported in 11 Cushing, 11.]

TROVER for three hundred and ninety-four squares of dirt, sand, and gravel. The defendants pleaded separately. At the trial in the Court of Common Pleas, before Wells, C. J., it appeared that the water-power company had contracted with the other defendants, Dalrymple and Lennon, to fill up a parcel of flats owned by the company, at a certain price per foot. In executing this contract, said Dalrymple and Lennon purchased earth of different persons by the load, delivered at the filling ground; and there was evidence that some earth had been taken from the plaintiffs' land without their consent, and sold by the trespassers to Dalrymple and Lennon at the ground. The defendants, Dalrymple and Lennon, requested the judge to instruct the jury that the earth was real estate, and therefore this action could not be maintained. But the judge instructed them that as soon as the earth was unlawfully severed from the freehold by the persons who sold it to Dalrymple and Lennon, it became personal property in their hands, and that this action might be maintained. They also requested the judge to instruct the jury that by bringing an action of trover, the plaintiffs waived the trespass to the land, and thereby adopted the act by which the property came into the possession of the vendors; and therefore that the plaintiffs could not maintain an action against *bona fide* purchasers, not having notice of the trespass. But the judge instructed the jury that this action could be maintained against *bona fide* purchasers without notice of the trespass.

The defendants further requested the judge to instruct the jury that, if the earth came to the possession of the defendants as *bona fide* purchasers, not having notice of the trespass, the plaintiffs must prove a demand on them before the commencement of the action and a refusal to deliver. But the judge instructed them, that if, without knowing of the trespass, Dalrymple and Lennon purchased the earth *bona fide*, and paid a full equivalent for it to the trespassers, and directed them to tip it up on the filling ground, they would be liable in this action for the value of the earth at the filling ground, and no demand or refusal would be necessary. And if, on the other hand, the defendants, Dalrymple and Lennon, knew where the earth was taken from, and ordered or procured the diggers to take it from the plaintiffs' lot, they would then be liable in this action for the value of the earth at the place where it was dug.



The jury found a verdict in favor of the water-power company, and against Dalrymple and Lennon, and they excepted to all said rulings.

*S. G. Thomas*, for the defendants. *P. W. Chandler*, for the plaintiffs.

DEWEY, J. It is certainly true that for an injury to his real estate the party cannot maintain trover. That form of action is appropriate exclusively to the recovery of damages for the unlawful conversion of personal property. But this being granted, the further inquiry is, whether the three hundred and ninety-four squares of earth severed from the land of the plaintiffs, and removed from the same and sold to the defendants, and used by them, was at the time of such purchase by the defendants, and use of the same, still a part of the realty, and retained unchanged its character as such, or whether by the act of separation in fact, and a removal of the earth to a distant place, it has not changed the character of the earth so removed to that of personal property. It seems to us that it is very well settled that whatever is severed from the land, — as, in the familiar case of standing timber trees, — if such trees, being a part of the realty, are cut down, they cease to be real estate and become personal. But this transmutation, while it changes the character of the property in this respect, does not change its ownership. It would not do so if cut down by the owner of the land, and not any more so by being cut down by a person entering unlawfully upon the land and making the severance. It is the actual severance that changes the property from real to personal, and that irrespective of its being done with or without the consent of the owner of the land. And in this respect we see no distinction between removing living trees deriving their nourishment from the earth, and the removal of a portion of the earth itself.

It is next objected that the plaintiffs, by bringing this action of trover, and waiving their action of trespass *quare clausum*, have adopted and sanctioned the original act of trespass, and therefore cannot maintain this action against one who purchased the earth *bona fide* of the trespassers. We do not perceive that any such claim appears. It is true that the plaintiffs have not elected to institute an action of trespass *quare clausum* against the original wrong-doers. But as regards these defendants, who have the property of the plaintiffs without right, nothing is waived; they did not commit any trespass upon the plaintiffs' land, and no action could have been maintained against these defendants therefor. Their first connection with the plaintiffs' property was after it had been severed from the realty, and the only mode of enforcing a claim against them for the value of the same is by a personal action. If the plaintiffs have not this remedy, they are remediless as to any recovery against those who have received and converted to their









own use their property. Take the case of valuable timber trees, cut down and carried away from the land, and sold by a mere trespasser. Is the owner of the same deprived of all remedy against any person who may have received these timber trees by purchase from the trespasser? He is so, unless trover will lie, for trespass *quare clausum* will not lie against such purchaser.

It is further contended that if the defendants were *bona fide* purchasers, and without notice of the trespass, the plaintiffs must prove a demand on the defendants and a refusal by them to redeliver before the commencement of the action. The court ruled upon this point if such purchase was made in the manner above stated, yet if they received the earth from the trespassers by a purchase for their own use, and directed that the same be deposited on the filling ground, they would be liable without any such demand and refusal. This ruling may be fully supported upon the ground of a conversion in fact of the earth, and the impracticability of a redelivery of the earth after it had become thus intermingled with the soil of the land on which it was placed, and had become a part of the solid earth. Whenever there has been an actual conversion, or whenever the property has been thus appropriated, it is evidence of a conversion which supersedes the necessity of any demand. This view is to us a satisfactory answer to the objection here urged, that there was no proof of a demand. But upon other grounds, under the late decision of this court in the case of *Stanley v. Gaylord*,<sup>1</sup> a case where the whole subject was much considered, and where the court came to the result that a *bona fide* purchase from one who had the actual possession of the property, but without any right to retain possession as against the lawful owner, and actual taking the same under such purchase into the custody and control of the purchaser, would subject him to an action of trespass or trover at the suit of the lawful owner, without any previous demand.

*Exceptions overruled.*<sup>2</sup>

<sup>1</sup> 1 Cush. 536.

<sup>2</sup> *McNeill v. Arnold*, 17 Ark. 172; *Robinson v. McDonald*, 2 Ga. 116; *Bane v. Detrick*, 52 Ill. 19; *Chandler v. Ferguson*, 2 Bush, 163; *Galvin v. Bacon*, 11 Me. 28; *Whipple v. Gilpatrick*, 19 Me. 427; *Harker v. Dement*, 9 Gill, 7; *Chapman v. Cole*, 12 Gray, 141; *Gilmore v. Newton*, 9 All. 171; *Heckle v. Lurvey*, 101 Mass. 344; *Carter v. Kingman*, 103 Mass. 517; *Trudo v. Anderson*, 10 Mich. 357; *Johnson v. White*, 21 Miss. 584; *Whitman Mining Co. v. Tritle*, 4 Nev. 494; *Hyde v. Noble*, 13 N. H. 494; *Lovejoy v. Jones*, 30 N. H. 164; *Cooper v. Newman*, 45 N. H. 339; *Bates v. Conkling*, 10 Wend. 389; *Carey v. Bright*, 58 Pa. 70; *Riford v. Montgomery*, 7 Vt. 411; *Grant v. King*, 14 Vt. 367; *Buckmaster v. Mower*, 21 Vt. 204; *Courtis v. Cane*, 32 Vt. 232; *Deering v. Austin*, 34 Vt. 330; *Bucklin v. Beals*, 38 Vt. 653; *Oleson v. Merrill*, 20 Wis. 462; *Eldred v. Oconto Co.*, 33 Wis. 133; *Beckwith v. Corral*, 2 C. & P. 261, acc.

*Parker v. Middlebrook*, 24 Conn. 207; *Wood v. Cohen*, 6 Ind. 455; *Stratton v. Allen*, 7 Minn. 502; *Storm v. Livingston*, 6 Johns. 44; *Barrett v. Warren*, 3 Hill, 348;

## CARR v. CLOUGH.

SUPERIOR COURT OF JUDICATURE, NEW HAMPSHIRE, JULY TERM, 1853.

[Reported in 26 New Hampshire Reports, 280.]

TROVER for a horse. The action was commenced December 3d, 1851. It appeared in evidence that the plaintiff and defendant, about the 1st of October, 1850, exchanged horses; and that upon the exchange, the plaintiff, a minor, being the owner of the horse in question, delivered the same to the defendant in exchange for a mare, which the defendant delivered to the plaintiff, the defendant at the same time agreeing to pay the plaintiff the sum of \$10 on the next day.

On the Monday next after the exchange the plaintiff told the defendant he wanted to trade back, and the defendant said he would not do it unless the plaintiff would pay him \$15. This took place at the house of the defendant; the mare was not present, and no offer was there made to return her. The defendant then told the plaintiff that he would come up the next morning and pay the boot; but he did not do it.

On the second day of December, 1850, the plaintiff went to the house of the defendant, taking the mare with him, and offered to return her to the defendant, and informed him that he would not abide by the trade, and requested the defendant to deliver him the horse in controversy. But the defendant refused to do it, saying that he would not let him have the horse, and would not receive back the mare. He assigned no reason for the refusal beyond what is heretofore stated. The mare was at that time in as good condition and of as great value as at the date of the exchange.

The defendant had sold the horse before the second day of December, when the plaintiff offered to return the mare.

A verdict was taken by consent for the plaintiff for the value of the horse, and interest from the second day of December, 1850; and it was agreed that judgment should be rendered thereon, or the verdict set aside and a new trial granted according to the opinion of this court upon the foregoing facts.

*Edes* (with whom was *Freeman* and *McClure*), for the defend-

*Houston v. Dyche*, Meigs, 76; *Dunham v. Converse*, 28 Wis. 306, *contra*. See also *Pierce v. Van Dyke*, 6 Hill, 613; *Millsbaugh v. Mitchell*, 8 Barb. 333; *Tallman v. Turck*, 26 Barb. 167, holding that the *onus* of proving good faith is upon the defendant. It would seem, however, that the authority of the New York cases above cited is seriously impeached by *Ely v. Ehle*, 3 N. Y. 506, which distinguishes between a delivery to and a taking by the defendant, treating the latter as a conversion without a demand. To the same effect is *Fuller v. Lewis*, 13 How. Pr. 219. — ED.











ant.<sup>1</sup> The sale of the horse by the defendant before the infant, the plaintiff, had rescinded his contract, as in this case, was not wrong. It neither violated any duty or moral or legal principle, and could not constitute a conversion. To constitute a conversion the act must be wrongful. 1 Chitty Pl. 149.

The demand and refusal, after the sale of the horse by the defendant, did not constitute a conversion. The horse had gone out of his power, and he could not deliver him. A demand and refusal will not constitute a conversion if the party have not the power of complying. The demand and refusal are not an actual conversion, but only evidence of a conversion. To make a demand and refusal sufficient evidence of a conversion, the party when he refuses must have it in his power to deliver up or retain the article. *White v. Phelps*; <sup>2</sup> *Young v. Walker*; <sup>3</sup> *Robinson v. Burleigh*; <sup>4</sup> *Kelsey v. Griswold*.<sup>5</sup>

*Burke*, for the plaintiff. The counsel for the defendant argues that, having parted with the property, he could not recover it, and therefore there was, notwithstanding a demand and refusal were proved, no evidence of a conversion; and to sustain this view of the case he cites *White v. Phelps*.<sup>2</sup>

On an examination of that case it seems to sustain the very opposite view of the law from that contended for by the defendant. In that case a horse was mortgaged to the plaintiff by one Howe. Howe afterwards sold the horse to one Greenleaf, and Greenleaf subsequently sold it to the defendant, who, knowing of the plaintiff's mortgage, and before the plaintiff demanded the horse, sold it to another person. The judge trying the cause directed a verdict for the defendant, on the ground that he had parted with the horse before demand and refusal. This ruling was reversed by the Superior Court, who held that the absolute sale of a horse which the defendant knew was mortgaged, was in itself a conversion. This authority would seem to be conclusive of the present case.

*Edes*, in reply. The case of *White v. Phelps* recognizes the doctrine in full, that where the defendant has sold and parted with the horse before demanded, the demand and refusal would not lay the foundation of an action of trover. At the time the defendant sold the horse the plaintiff had neither the possession nor the right of possession, and *White v. Phelps* does not sustain the plaintiff but the defendant.

EASTMAN, J. Assuming that the horse, for the value of which this

<sup>1</sup> See *supra*, p. 393, note 2.

<sup>2</sup> 12 N. H. Rep. 385; 2 Phill. on Ev. 119, chap. 10.

<sup>3</sup> 12 N. H. Rep. 502.

<sup>4</sup> 5 N. H. Rep. 225.

<sup>5</sup> 6 Barbour's Rep. 436.

action was brought, was sold in good faith by the defendant, and its possession parted with before the formal rescission of the contract by the plaintiff on the 2d of December, and assuming, also, that nothing had taken place that would amount to or be evidence of a rescission until that day, this action cannot be sustained; for the contract being executed, and the animal delivered to the defendant by the plaintiff himself, the sale of the horse by the defendant before the rescission could not amount to a conversion, since the possession of the defendant was at that time rightful and his control over the property complete. Nor would the plaintiff be aided by the demand and refusal, for it was made after the defendant, upon the assumption of a *bona fide* sale, had legally parted with the property, and when he had no power to comply with the demand. A demand and refusal merely, are only evidence of a conversion. They do not constitute a conversion if the party has not the power of compliance. *White v. Phelps*; <sup>1</sup> *Knapp v. Winchester*.<sup>2</sup> The demand here, in order to be effectual, would necessarily have to be made before the sale and after the rescission.

*Judgment on the verdict.*<sup>3</sup>

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### LORING v. MULCAHY.

SUPREME JUDICIAL COURT, MASSACHUSETTS, JANUARY TERM, 1862.

[Reported in 3 Allen, 575.]

TORT for the conversion of goods which had been stolen from the plaintiff's shop, and carried to the defendant's house, with his knowledge, and left in his possession, and afterwards taken away and secreted by the same persons who carried them there. At the trial in the Superior Court, Putnam, J., instructed the jury that "if the defendant received these goods into his possession and control, knowing that they were stolen, or that they were not the property of the parties who brought them, and that they came unlawfully by them, it was a conver-

<sup>1</sup> 12 N. H. Rep. 385.

<sup>2</sup> 11 Vt. Rep. 351.

<sup>3</sup> *Horwood v. Smith*, 2 T. R. 750; *Davis v. Buffum*, *infra*, p. 567; *Dearbourn v. Nat. Bank*, 53 Me. 273; *Dietus v. Fuss*, 8 Md. 148; *Wellington v. Wentworth*, *supra*, p. 555; *Johnson v. Couillard*, 4 All. 446; *Pitlock v. Wells*, 109 Mass. 452; *Lockwood v. Bull*, 1 Cow. 322; *Packard v. Getman*, 4 Wend. 613; *Hawkins v. Hoffman*, 6 Hill, 586; *Hill v. Covell*, 1 N. Y. 522; *Bowman v. Eaton*, 24 Barb. 528; *Whitney v. Slauson*, 30 Barb. 276; *Nat. Bank v. Wheeler*, 48 N. Y. 492; *Hoover v. Alexander*, 1 Bail. 510; *Robertson v. Wurdeman*, *Dudley*, 234; *Morris v. Thomson*, 1 Rich. 65; *Knapp v. Winchester*, 11 Vt. 351.

See also *Verrall v. Robinson*, 2 Cr., M. & R. 495; *Catterall v. Kenyon*, 3 Q. B. 310; *Jenner v. Joliff*, 6 Johns. 9; *Jenner v. Joliff*, 9 Johns. 381; *Rogers v. Weir*, 34 N. Y. 465-467. — *LD.*











sion by the defendant." The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

*W. P. Webster*, for the defendant. *L. H. Wakefield*, for the plaintiff.

METCALF, J. These exceptions must be sustained. On the evidence therein stated, the defendant did not convert the goods to his own use, but was a mere depositary thereof, — a naked bailee. He did not assume to dispose of them as if they were his own, nor did he withhold them from the plaintiff on his demand. *Non constat* that he would not readily have restored them to the plaintiff if he had been required so to do. It does not appear that he had any intention to conceal the property from the owner, or that he made any agreement with the bailors to secrete it. In *Simmons v. Lillystone*, Baron Parke says: "In order to constitute a conversion there must be an intention of the defendant to take to himself the property in the goods, or to deprive the plaintiff of it." See also *Polley v. Lenox Iron Works*,<sup>1</sup> and cases there cited; *Fouldes v. Willoughby*. If, on the evidence in this case and the instructions given to the jury, the defendant was rightly found guilty of converting the goods to his own use, then would an innkeeper, who should receive into his stable a horse that he knew to be stolen, and should permit the person who brought him there to take him away, be guilty of converting the horse to his own use.

*Exceptions sustained.*

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## DAVIS v. BUFFUM.

SUPREME JUDICIAL COURT, MAINE, 1863.

[Reported in 51 Maine Reports, 160.]

ON report from *Nisi Prius*. This was an action of trover for a box board sawing machine, an edging saw and table, a cutting saw and apparatus, and two mill saws, all alleged to be of the value of five hundred dollars.

*Howard* and *Strout*, for the plaintiffs. *T. M. Hages*, for the defendant.

The facts in the case sufficiently appear from the opinion of the court; which was drawn up by

APPLETON, C. J. On the 7th of January, 1854, the defendant leased his saw-mill to Samuel Mitchell and A. C. Grant, who put the machinery, which is the subject-matter of the present suit, in the same. After remaining some time in possession of the premises leased,

<sup>1</sup> 2 Allen, 182.

they assigned the lease and sold the machinery to the plaintiffs, who thereupon entered and occupied. During their occupation, and before the expiration of the term, the defendant, by deed of warranty, dated Dec. 15, 1854, conveyed his mill, "being known as the Buffum Mill, . . . with the privileges and appurtenances thereto belonging," to Joseph Dane, Jr., and Oliver Perkins, Jr., to whom the plaintiffs attorned, paying to them rent during the residue of the term, which expired the last of July, 1855, when they quit the premises, leaving their machinery therein. On or about the 1st of September following they made a demand upon the defendant for the articles in controversy.<sup>1</sup>

This being an action of trover, the only question presented is, whether the plaintiffs have shown an act of conversion on the part of the defendant.

The plaintiffs claim to recover on the ground that the defendant's deed to Dane and Perkins was *per se* a conversion, before the expiration of his lease.

But this is not so. When that deed was executed the plaintiffs were in the undisturbed enjoyment of their property, and so remained during the whole duration of the lease. The deed of the defendant conveyed nothing he did not own; certainly not to grantees with notice of all the facts. The giving a bill of personal property in the possession of a third person, who is the owner of the same, without any other interference therewith or delivery thereof, is not, as against such owner, a conversion by either the person giving or receiving such bill of sale. In *Fuller v. Taber*,<sup>2</sup> the plaintiff brought an action of trover for a building, which had been placed on the land of another by his precedent consent or subsequent assent. The defendant, when a demand was made, said he had bought it and paid for it. The court instructed the jury that, taking a quitclaim deed of the land and building and putting it on record, would not of itself constitute a conversion on the part of the individual so receiving the deed. Neither can the mere giving a deed of land leased, the lessee continuing in quiet possession, be deemed a conversion of fixtures which the tenant has the right to remove during his term. The lease was as valid after as before the deed. The rights of the lessee remained the same. The deed was no more a conversion of the tenant's fixtures than it was a breach of the covenants of the lease. The mere taking a mortgage of personal property from one having no title, and recording the same without taking possession of the mortgaged property or interfering with the same, constitutes no conversion for which trover will lie. *Burnside v. Twitchell*.<sup>3</sup>

<sup>1</sup> See *supra*, p. 393, note 2. — Ed.

<sup>2</sup> 39 Me. 519.

<sup>3</sup> 43 N. H. 390.









The demand of the plaintiffs in September, after they had quitted the premises, constituted no conversion. A demand and refusal are not necessarily a conversion, but only evidence from which a conversion may be inferred. After the expiration of the lease the tenant's right of removal ceased. "Fixtures," remarks Alderson, B., in *Winshall v. Lloyd*,<sup>1</sup> cannot become goods and chattels until the tenant has exercised his right of making them so, which he can only exercise during his possession. The moment that expires he cannot remove them; and trover cannot therefore be maintained for them." In *McIntosh v. Trotter*,<sup>2</sup> it was held that a lessee could not, even during his term, maintain trover for fixtures which were attached to the freehold, and that a sale of them was not a conversion. "Would trover lie for a crop of standing corn?" inquired Parke, B. Nor could the tenant maintain trover against his landlord for not permitting him to enter after his lease had expired, to remove fixtures which he had erected. *Stockwell v. Marks*.<sup>3</sup>

When this demand was made, the defendant had neither actual nor constructive possession of the property demanded. He had no right to it nor control over it. He could not therefore comply with the demand. In such cases a demand and refusal only will not support an action of trover. *Kelsey v. Griswold*.<sup>4</sup> A defendant, in an action of trover, cannot be deemed guilty of a conversion of the property upon evidence of a demand and refusal merely, unless the property was in some way subject to his control. *Yale v. Saunders*.<sup>5</sup> So if the defendant has not the power to comply. *Carr v. Clough*; *Boobier v. Boobier*.<sup>6</sup>

*Plaintiff nonsuit.*<sup>7</sup>

DAVIS, KENT, WALTON, and DICKERSON, JJ., concurred.

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## FARRAR v. ROLLINS.

SUPREME COURT, VERMONT, AUGUST TERM, 1864.

[Reported in 37 Vermont Reports, 295.]

TROVER for a sled. Plea: The general issue. Trial by jury, June term, 1864, Aldis, J., presiding.

The plaintiff's evidence tended to show that the defendant, by his

<sup>1</sup> 2 Mees. & Wels. 450.

<sup>2</sup> 3 Mees. & Wels. 184.

<sup>3</sup> 17 Me. 455.

<sup>4</sup> 6 Barb. 436.

<sup>5</sup> 16 Vt. 243.

<sup>6</sup> 39 Me. 406.

<sup>7</sup> *Fuller v. Tabor*, 39 Me. 519; *Burnside v. Twitchell*, 43 N. H. 390; *Matteawan Co. v. Bentley*, 13 Barb. 641; *Andrews v. Shattuck*, 32 Barb. 396; *Glover v. Riddick*, 11 Ired. 582; *Irish v. Cloyes*, 8 Vt. 30, acc. See *Decker v. Shelton*, 1 N. Y. Supreme Ct. R. 224. — ED.



hired man, Cole, borrowed a sled of him to use during the season of threshing, and agreed to return it when he was done; that after he was done the plaintiff requested him to return the sled to his house where he got it, and the defendant wholly refused, upon the ground that he never borrowed it or authorized Cole to borrow it, but that Cole borrowed it for his own use.

There was no other evidence of conversion, or of the defendant's making any claim to the sled.

The court instructed the jury, for the purposes of this trial, that if they found the facts as the plaintiff's evidence tended to show, it would amount to a conversion; to which the defendant excepted.

*Peck and Colby*, for the defendant, cited *Heald v. Carey*; *Sharpe v. Pratt*.<sup>1</sup>

*O. S. and C. C. Burke*, for the plaintiff.

POLAND, C. J. It is fairly to be inferred from the exceptions that the plaintiff's sled was in the defendant's possession at the time the plaintiff requested the defendant to return it.

The plaintiff did not claim that the defendant obtained possession of it wrongfully, but that he loaned it to him, or to his servant, so that there was no conversion by a wrongful taking. But the plaintiff claims that it was unlawfully detained and withheld from him by the defendant when he called for or demanded it.

The plaintiff requested the defendant to return the sled to his (the plaintiff's) house, where he got it. This the defendant refused to do, on the ground that when Cole borrowed the sled he borrowed it for himself, and not for the defendant. The defendant made no claim to the sled, and no objection to the plaintiff's taking it; he only refused to carry it to the plaintiff's house, claiming he was under no obligation to do so. If the borrowing was really on behalf of the defendant, so that it was his duty to have returned it to the plaintiff, his refusal to do so was no conversion; it was a mere breach of contract, for which he might be liable in a proper action.

The principle is undoubted that where one has the property of another in his possession, with no right to retain it, and being called on to surrender it to the owner, refuses, he is guilty of conversion, and trover will lie. But here was no refusal to surrender the sled to the plaintiff, and no withholding it from him; indeed, the plaintiff did not ask to have it delivered to him. He claimed that the defendant should carry the sled to his house, which the defendant refused. If this refusal was wrongful, it was no conversion. There was no repudiation of the plaintiff's right to the sled, and no assertion or exercise of any dominion over it by the defendant inconsistent with the plaintiff's right.

<sup>1</sup> 14 C. L. R. 198.









The plaintiff could have his sled when he called for it, but insisted the defendant should fulfil his duty, or perform his contract by carrying it home.

*Judgment reversed and case remanded.*<sup>1</sup>

## McCORMICK v. PENNSYLVANIA CENTRAL RAILROAD COMPANY.

COURT OF APPEALS, NEW YORK, APRIL, 1872.

[Reported in 49 New York Reports, 303.]

APPEAL from judgment of the general term of the Supreme Court in the first judicial department, affirming a judgment in favor of plaintiff entered upon a verdict, and affirming an order denying a motion for a new trial.

The action was brought to recover the value of certain clothing, jewelry, &c., constituting the baggage of plaintiff, accompanying him while travelling with his wife, alleged by him to have been converted by defendant.

On the 11th of March, 1863, plaintiff, in company with his wife, presented the baggage in question at the passenger depot of defendant in Philadelphia, and desired to have the same checked from thence to Chicago. By a rule or regulation of the defendant, no passenger could rightfully demand that his baggage should be checked for transportation on their road until he should first procure and exhibit to the baggage-master passage tickets for the distance he was entitled to be carried. The baggage-master demanded passage tickets as a condition to checking such baggage. Plaintiff left for the purpose of procuring them. In his absence the baggage-master caused said baggage to be placed in the baggage car of the defendants, and, on the plaintiff's return with his tickets for Chicago, refused to give checks for the baggage without extra compensation on account of its excess of weight, which the plaintiff refused to pay, and demanded his baggage or the checks therefor. The baggage-master refused to deliver either. The reason for the refusal to deliver the baggage was that it was covered by other baggage, and could not be reached and removed before the time for starting the train. Plaintiff declined to go upon that train. The baggage was carried safely to Chicago, and, no one being there to receive it, was stored in the usual place for unclaimed baggage, and upon the night succeeding its arrival was destroyed by fire.

Upon the trial certain memoranda or lists of the articles in the trunks were read. The facts in regard thereto are set forth in the opinion.

<sup>1</sup> Dame v. Dame, 38 N. H. 429; Munger v. Hess, 28 Barb. 75, acc. — ED.

Plaintiff received an order upon the baggage-master at Pittsburgh to deliver the baggage without checks. A telegram had been sent to stop the baggage there. This order plaintiff delivered, upon his arrival at Pittsburgh, to a Mr. Richardson, an agent of defendant, and was informed that the telegram was received, but that in the hurry the baggage had not been stopped. This was objected to upon the ground that it was not in connection with any act as agent.

Other facts and questions presented appear in the opinion.

The court directed the jury to find a verdict for plaintiff, submitting to them simply the question of damages. The jury rendered a verdict for plaintiff for \$10,660.61.

*Charles M. Da Costa* and *Ira Shafer*, for the appellant.<sup>1</sup> The defendant being a common carrier, an appropriation of the goods to its own use must be shown to sustain action. *Whitney v. Wilson*;<sup>2</sup> *Tolano v. National Steam Nav. Co.*;<sup>3</sup> *Devereux v. Barclay*; *Stevenson v. Hart*;<sup>4</sup> *Nelson v. Whitmore*.<sup>5</sup> The demand and refusal were not conclusive proof of conversion, but only evidence tending to show the conversion. *Rook v. Midland R. R. Co.*;<sup>6</sup> *Wild v. Walters*;<sup>7</sup> *Kelsey v. Griswold*;<sup>8</sup> *Andrews v. Shattuck*;<sup>9</sup> *Dunlap v. Hunting*;<sup>10</sup> *Johnson v. Couillard*;<sup>11</sup> *Robinson v. Burleigh*;<sup>12</sup> *Ludley v. Downing*;<sup>13</sup> *Nelson v. Whitmore*. Where a qualification is attached to a refusal, the question is, whether such qualification be a reasonable one or not. *Gunton v. Nurse*;<sup>14</sup> *Fouldes v. Willoughby*; *Hayward v. Seaward*; *Wilde v. Waters*;<sup>15</sup> *Deert v. Childs*;<sup>16</sup> *St. John v. O'Connell*;<sup>17</sup> *Mount v. Derick*;<sup>18</sup> *Thompson v. Sixpenny Savings Bank*;<sup>19</sup> *McEntee v. N. J. Steamboat Co.*<sup>20</sup> Whether the refusal under the circumstances constituted conversion or not, was a question of fact for the jury. *Lockwood v. Bull*;<sup>21</sup> *Jessup v. Miller*;<sup>22</sup> *Thompson v. Sixpenny Savings Bank*,<sup>23</sup> and cases there referred to; *Watt v. Potter*.<sup>24</sup> Conversion is waived by any subsequent acts inconsistent with it or ratifying the wrongful act. *Wells v. Kelsey*;<sup>25</sup> *Ball v. Liney*;<sup>26</sup> *Brewer v. Gregory*;<sup>27</sup> *Lythgoe v. Vernon*;<sup>28</sup> *Rotch v. Hawes*;<sup>29</sup> *Hewes v. Parkman*;<sup>30</sup> *Firemen's Insurance Co. v.*

<sup>1</sup> See *supra*, p. 393, note 2. — Ed.

<sup>2</sup> 30 Barb. 276.

<sup>5</sup> 1 Richardson, 323.

<sup>7</sup> 32 Eng. Law & Eq. 422.

<sup>10</sup> 2 Den. 643.

<sup>13</sup> 2 Ind. 419.

<sup>15</sup> 32 Eng. Law & Eq. 422.

<sup>17</sup> 7 Port. 466.

<sup>20</sup> 45 N. Y. 34.

<sup>23</sup> 5 Bosw. 311.

<sup>26</sup> 44 Barb. 504, 514, 515.

<sup>28</sup> 5 Hurl. & N. 179.

<sup>3</sup> 5 Robertson, 318.

<sup>6</sup> 14 Eng. Law & Eq. 178.

<sup>8</sup> 6 Barb. 443.

<sup>11</sup> 4 Allen, 446.

<sup>14</sup> 2 Brod. & Bing. 447.

<sup>16</sup> 5 Stew. & Port. (Ala.) 383.

<sup>18</sup> 5 Hill, 456.

<sup>21</sup> 1 Cow. 330, 333.

<sup>24</sup> 2 Mason, 80.

<sup>27</sup> 2 Barn. & Cress. 310.

<sup>29</sup> 12 Pick. 139.

<sup>4</sup> 4 Bing. 476.

<sup>9</sup> 32 Barb. 397.

<sup>12</sup> 5 N. H. 225, 228.

<sup>19</sup> 5 Bosw. 311.

<sup>22</sup> 1 Keyes, 323.

<sup>25</sup> 15 Abb. 53.

<sup>30</sup> 20 Pick. 90.











Cochran;<sup>1</sup> *Bell v. Cummings*.<sup>2</sup> Whether the facts constitute a waiver, is a question for the jury. *Lucas v. Trumbull*.<sup>3</sup>

FOLGER, J. Was there a conversion of the property by the defendant so as to warrant this action?

The defendant claims that there is no conversion unless there was an appropriation of the goods to its own use, and puts it in part upon the ground that the defendant was a common carrier. In the first place, the defendant does not in this action hold the place of a common carrier of plaintiff and his goods. If there is a cause of action, as at present before us, it is because the plaintiff would not consent to take on with the defendant the relation of passenger with his baggage. He refused to do so, and demanded return to him of his goods. His trunks and their contents were then no longer to be treated in the transaction as baggage of a passenger in the hands of the defendant as a common carrier of him and them, but as property of one in the possession of another, delivery of which to the owner had been demanded and been refused. Again, a common carrier is not always excused in an action for conversion, because he has not in fact applied to his own use the goods committed to him in his public capacity. *Dewell v. Moxon*.<sup>4</sup> It is doubtless correct to say, as a general proposition, that demand and refusal are not conclusive evidence of conversion. There may be such a state of facts shown in opposition as fully to rebut. But such may be the case also, as that demand and refusal shall be enough. If one have the power to deliver or to retain the article demanded, a demand and a refusal to deliver is sufficient evidence of a conversion. *Bristol v. Burt*. A refusal, however, may be accompanied with such reasonable qualification as to furnish an excuse for retention, and then there is no conversion shown merely by proof of demand and refusal. *McEntee v. N. J. Steamboat Co.*<sup>5</sup> In the case before us, the qualification was, that the prearranged moment for the starting of this fast express through passenger train was so right upon the defendant, that to take the measures needed to get at in the baggage crate the trunks of the plaintiff, and removing them therefrom, to put them again in his possession, would take so long, as to derange the time table, insure delay, and incur the hazard of accident and damage. As to this, the business of the defendant as a common carrier of persons is an element in the case. We are not prepared to say that, under the usual circumstances of one taking passage with ordinary baggage, and at the last moment for his own convenience changing his purpose, it would not be a good excuse for a refusal to deliver it, so as to reel the conclusion of a con-

<sup>1</sup> 27 Ala. 228.

<sup>2</sup> 3 Sneed (Tenn.), 286.

<sup>3</sup> 15 Gray, 309.

<sup>4</sup> 1 Taunt. 391; Anon., 2 Salk. 655.

<sup>5</sup> 45 N. Y. 34.

version of the goods, that the delay needed therefor would throw out of gear the arrangements for the running of the train, and thus risk be incurred to the passengers and property carried. There would be, to be sure, the physical power to delay the train and to overhaul the baggage and to find and deliver to him his own. But there would be, on the other hand, the duty to others, of heeding all salutary and necessary arrangements for a safe journey for them. Does not the presence of this fact in any case, presenting the duty of a railroad company to be thoughtful of the safety of the passengers under its care, put a weighty consideration in the scale over against the evidence of conversion of baggage furnished by the simple fact of a demand and refusal to deliver it?

There is, however, an important circumstance in this case, which is to be borne in mind in the consideration of this question. It was one of the regulations of the defendant that no baggage should be checked until the passenger tendering it should have bought his ticket. On the plaintiff offering his trunks for checks, he was required by the baggage-man, in obedience to this rule, to first provide his tickets. During his absence for them, the baggage-man weighed the trunks, put checks upon them, and placed them in the baggage crate, and upon the top of them was placed other baggage. After this was done the plaintiff returned with his tickets. The baggage agent then enforced upon the plaintiff another rule of the defendant. Inasmuch as the weight of the trunks was apparently more than the number of tickets bought would entitle the passengers going under them to carry as ordinary baggage, there was demanded of the plaintiff payment of a charge for the excess. It was the enforcement of this rule that caused the plaintiff to yield his purpose of travel by that train, and to demand possession of his baggage again. Had the baggage-man adhered to the rule not to check and load baggage until tickets were bought, a rule of which he had demanded observance from the plaintiff, the trunks might have been beside the car, and surrender of possession to the plaintiff would have been easy. Had the man in the first instance, before requiring the purchase of tickets, asked for the extra charge for overweight, and had the plaintiff declined, then return to him of his property could have been easily made. No doubt but that the defendant had the right to neglect observance of any or all of these rules, they being made for its convenience and protection. But it had no right to first enforce one upon the plaintiff and then itself disregard it, and inflict the inconvenient result of vacillation upon him. It insisted that he should act up to it. While he was so doing, it neglected it, and in that neglect so placed his baggage, as that when it came to demand of him the observance of another rule of which he had not been therefore notified,











and he refused and demanded his property, the practical difficulty arose of the inability to meet the changed aspect of affairs.

It does not appear but that he would have refused to pay the extra charge had it been made before he was sent to procure his tickets, and thus his trunks never have gone out of reach. It is said that the baggage-master could not know that there was an excess of baggage until the number of tickets was apparent to him. He did know, however, that apparently there was but one passenger, with his wife, to whom it belonged, and if there was to be on his part an enforcement of all the rules of the company before the plaintiff was to be allowed to take his place as passenger carrying his trunks with him, it was this agent's duty to keep matters in such a state as that it should be possible to meet the contingency of a refusal on the part of the plaintiff to comply, and of the consequent necessity of surrendering to him his property. This deviation by the defendant from the rule which the plaintiff was obeying, may have been the cause of the inability of the defendant to comply with his demand for the delivery of his property.

Again, the plaintiff, after payment of the charge for extra baggage was required of him, first demanded the checks for his trunks; and it was not until the refusal of them that he made demand for the delivery of the trunks themselves. So that the defendant had the option of giving the checks or giving the trunks; and if the circumstances which it had brought about made the latter impracticable, the former might have been done. Thus there is another element in the inquiry as to the reasonableness of the excuse. And was, then, that inability stated as an excuse for not making delivery a reasonable qualification of the refusal so to do?

It is not for the court, in this case, to pass upon this as a question of law, whether there was or was not a conversion. Whether or not the qualification of the refusal to deliver was reasonable in this case, is a question of fact for the consideration of the jury under proper instructions from the judge. *Mount v. Derick*; <sup>1</sup> *Watt v. Potter*; <sup>2</sup> *Alexander v. Southey*; *Delano v. Curtis*.<sup>3</sup>

And in this view the testimony in the case, as to an arrangement between the plaintiff and Thompson, the president of the defendant, for the retention and delivery of the trunks to the plaintiff at Pittsburgh, and what took place between the plaintiff and the defendant's agent at Pittsburgh as to the trunks having passed on to Chicago, and the arrangement for him to receive them there, was proper to have been submitted to the jury as bearing on the question of a conversion.

<sup>1</sup> 5 Hill, 455.

<sup>2</sup> 2 Mason, 80.

<sup>3</sup> 7 Allen, 470.

Hayward v. Seaward. The defendant is understood to claim that this testimony tended to show what should be termed a waiver: *Lucas v. Trumbull*,<sup>1</sup> *Trayner v. Johnson*;<sup>2</sup> or a ratification of the act of the defendant in sending forward the baggage: *Hewes v. Parkman*;<sup>3</sup> or an affirmation of the act and a treating of the defendant as the agent of the plaintiff in doing it: *Brewer v. Sparrow*;<sup>4</sup> or as a satisfaction for the wrongful act: *Lythgoe v. Vernon*;<sup>5</sup> or as testimony tending to rebut the evidence of conversion furnished by the demand and refusal, and so going to show that there was no conversion by the defendant to its own use of the property of the plaintiff.

As the authorities are in this State, the last is the better view of it. See *Hanmer v. Wilsey*,<sup>6</sup> *Otis v. Jones*,<sup>7</sup> which hold that a mere tender will not bar a tort, nor take away a right to a full compensation in damages; and *Reynolds v. Shuler*,<sup>8</sup> where it is laid down that trover lies for the conversion of a chattel, though it be restored before suit brought, the restoration going only in mitigation of damages.

The testimony should have been submitted to the jury on the issue of a conversion. And see *Carver v. Nichols*.<sup>9</sup>

And the learned justice erred at the circuit in taking these questions from the jury, and passing upon them as matters of law for his determination. It follows that there must be a new trial.

All concur upon questions discussed, save on question of conversion.

ALLEN, J., concurs with opinion.

CHURCH, C. J., and RAPALLO, J., are of opinion that, as matter of law, there was no conversion.

GROVER and PECKHAM, JJ., are of opinion that, as matter of law, there was a conversion, and they dissent from result.

For reversal, CHURCH, C. J., FOLGER, ALLEN, and RAPALLO, JJ.

For affirmance, GROVER and PECKHAM, JJ. *Judgment reversed.*

<sup>1</sup> 15 Gray, 306.

<sup>4</sup> 7 B. & C. 310.

<sup>7</sup> 21 Wend. 394.

<sup>2</sup> 1 Head, 51.

<sup>5</sup> 5 H. & N. 179.

<sup>8</sup> 5 Cow. 323.

<sup>3</sup> 20 Pick. 90.

<sup>6</sup> 17 Wend. 91.

<sup>9</sup> 10 Gray, 369.









## CHAPTER IX.

## DEFAMATION.

## SECTION I.

*Publication.*

## HALL v. HENNESLEY.

IN THE QUEEN'S BENCH, MICHAELMAS TERM, 1596.

[Reported in Croke's Elizabeth, 486.]

ACTION for words. Whereas he was robbed by persons unknown of divers parcels of linen cloth; that the defendant *præmissa sciens*, in slander of the plaintiff, spake these words in the presence of divers others, viz.: "Hugh Hall" (*innuendo* the plaintiff) "hath received three pieces of his cloth again of the thief, and beareth with the thief, and if I have any hurt hereafter, I will charge him with it." After verdict for the plaintiff, it was moved in arrest of judgment that an action lies not for these words; for when he saith that he was robbed by persons unknown, then the saying that he received his goods of the thief is not any offence; for it is not alleged that he knew who was the thief from whom he received his goods. And to say that he bare with the thief is no offence; for one may bear with a thief, as to bear with him that he shall not prosecute him, which is not any offence in law; and one may receive his goods again which were stolen without offence,<sup>1</sup> unless it be done on purpose to conceal the offender and to help him to escape. It was moved, also, that this declaration was not good; for it is that he spake those words *in præsentia diversorum*, and doth not say *in auditu*, and if none heard, it is not a slander; and as to it, *non allocatur*. For it shall be necessarily intended that it was *in auditu*, when it was *in præsentia*, &c. But for the words themselves, they all held, for both reasons alleged, that they were not actionable.

Wherefore it was adjudged for the defendant.<sup>2</sup>

<sup>1</sup> *Sed vide* 4 Geo. I. c. 2, and 25 Geo. II. c. 36, by which a penalty is inflicted on this offence.

<sup>2</sup> McGowan v. Manifee, 7 Monr. 314; Brown v. Brashier, 2 P. & W. 114; Burbank v. Horn, 89 Me. 235, acc. See Curtis v. Moore, 15 Wis. 137. — Ed.



## TAYLOR v. HOW.

IN THE COMMON PLEAS, MICHAELMAS TERM, 1601.

[Reported in *Croke's Elizabeth*, 861.]

ACTION for these words: "He" (*innuendo* the plaintiff) "is not worthy the office of a constable, for he and his company, the last time he was constable, stole five of my swine and ate them." After verdict for the plaintiff, it was moved by YELVERTON that the declaration was not sufficient; for the words "he is not worthy," &c., may be spoken of any other, and the *innuendo* will not help it; also he doth not say that he spake the words *in præsentia et auditu aliorum*, and if it were otherwise it is not any slander. But all the court held that the action well lay, for *hic et ille* make a demonstration what person he intended; and it is also alleged that he spake *de querente* those words, &c. The words also *quod palam et publice promulgavit* imply *quod fuit in præsentia et auditu*, &c.; for it is not *palam* unless it be *in præsentia et auditu aliorum*.

Wherefore it was adjudged for the plaintiff<sup>1</sup>

## PRICE v. JENKINGS.

IN THE EXCHEQUER CHAMBER, MICHAELMAS TERM, 1601.

[Reported in *Croke's Elizabeth*, 865.]

ACTION for words. And declares that the defendant spake these words in Welsh (reciting them particularly), signifying *hæc Anglicana verba*, "Thou has murdered thy wife." After verdict and judgment for the plaintiff, error was brought and assigned *in hoc*, that it is not averred that the words were spoken in the company of Welshmen, or of such who understood the Welsh tongue; but it is alleged that they were spoken *in præsentia et auditu quamplurimorum subditorum dominæ reginæ*. And the action was brought in the county of Monmouth, which was once parcel of Wales, but was now an English county. And all the justices and barons held, that for this cause it was erroneous; for it shall not be intended that any there understood the said tongue, unless it had been shown; and when it was not any slander, no more than if one spake slanderous words in French or Italian, and action lies not, unless it be averred that some there present

<sup>1</sup> Ware v. Cartledge, 24 Ala. 622; Goodrich v. Warner, 21 Conn. 432; Burton v. Burton, 3 Greene, 316; Watts v. Greenlee, 2 Dev. 115; Hurd v. Moore, 2 Oreg. 85; Duel v. Agan, 1 Code Reporter, 184; Warstei v. Holman, 2 Hall, 172, acc. — ED.









understood those languages; as it was held in the case of Jones v. Davers. But because the damages were found to £50, and if the plaintiff should begin *de novo*, he might not have peradventure so great damages, they moved him to accept of £10, and to make an end without further proceedings; and so it was done, and no judgment entered.<sup>1</sup>

## BALDWIN v. ELPHINSTON.

IN THE EXCHEQUER CHAMBER, TRINITY TERM, 1775.

[Reported in 2 Blackstone, 1037.]

ERROR in the Exchequer Chamber from a judgment in the King's Bench. The declaration was in an action on the case, first, for printing and publishing in the "St. James's Chronicle" a libel grossly traducing the plaintiff in his capacity of a captain in the navy; second, for printing and causing to be printed another similar libel. The defendant pleaded the general issue, and on the trial the jury found a general verdict for the plaintiff, with damages £500, on which judgment was accordingly entered. The special error assigned was, that in the second count the defendant is only charged with the printing, and not the publication, of the libel, which is insufficient to maintain the action.

This case was argued this term by *Davenport* for the plaintiff, and *Lee* for the defendant in error, and in the end of the term *DE GREY*, C. J., delivered the opinion of himself and *SMYTHE*, C. B., and all the rest of the justices and barons, viz.:—

We are all of opinion to affirm the judgment; for, though we agree with the counsel for the plaintiff in error in the two propositions he has stated,—viz., 1. That where there are two counts in a declaration, one perfect and the other not so, general damages cannot be regularly given (see *Dyer*, 309 *b*; 5 Co. 108; 10 Co. 31; Cro. Car. 127); and 2. That in actions for libels, if no publication is stated in the declaration, the count is bad (see *Hob.* 62, 215),—yet we apprehend there is a publication sufficiently stated in the present case.

There are various modes of publication, and no technical words are necessary to describe it. Words may be published by preaching, teaching, or advised speaking, even where the consequences are highly penal. A written libel may be published in a letter to a third person.

<sup>1</sup> Jones v. Davers, Cro. Eliz. 496; Amann v. Damm, 8 C. B. n. s. 597; Wormouth v. Cramer, 3 Wend. 394, acc. See Bechtell v. Shatler, Wright (Ohio), 107. Conf. Anon., Moore, 182; Gibbs v. Jenkins, Hob. 191; Zenobio v. Axtell, 6 T. R. 162; Jenkins v. Phillips, 9 C. & P. 766; Hickley v. Grosjean, 6 Blackf. 351; Kernholtz v. Becker, 3 Den. 346; Rahausser v. Barth, 3 Watts, 28; Zeig v. Ort, 3 Chandl. 26; K. v. H., 20 Wis. 239; Filber v. Dauterman, 26 Wis. 518. — Ed.

The word *palam* has been held to state a publication sufficiently. Cro. Eliz. 861. There are in Rastall's Entr. tit. *Action sur le Case*, 13 a, two instances of constructive publications, by delivering letters to A. and B., and by fixing them on the door of St. Paul's Church. See also 3 Cro. 327, Penson and Gooday; and 2 Lev. 193. It is therefore sufficient if there be stated in the declaration such matter as amounts to a publication, without using the formal word published, and the jury are upon the evidence to decide whether a publication be sufficiently proved or no.

Printing a libel may be an innocent act; but, unless qualified by circumstances, shall *prima facie* be understood to be a publishing. It must be delivered to the compositor and the other subordinate workmen. Printing in a newspaper, as laid in the declaration, admits of no doubt upon the face of it. It shall be intended a publication, unless it be shown that the newspaper so printed by the defendant was suppressed and never published. It is stated that he caused to be printed. This confirms the fact of publication, because it calls in a third person, as agent, to whom the libel must have been communicated. The introduction to this count states that it was so printed with a malicious intent to injure the plaintiff as aforesaid, which connects it with the introduction to the first count, which speaks of publishing the several libels thereafter mentioned in the plural number. This is the legal, as well as grammatical, construction of the words. The conclusion of the whole declaration states that, by means of the printing and publishing of the said several libels, the plaintiff is greatly injured. In short, the count does not state generally, as it might have done, that the libel was published, but it expresses the particular mode of publication, viz., by printing in a newspaper. It thereby puts the publication in issue, and the jury have found it so. By such finding, they have excluded the idea of innocent printing, for they have found it to be done maliciously, to the infamy and damage of the plaintiff.

Therefore, *per tot. cur.*,

*Judgment was affirmed.*<sup>1</sup>

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### SMITH v. WOOD.

AT NISI PRIUS, CORAM LORD ELLENBOROUGH, C. J., JANUARY 20,  
1813.

[Reported in 3 Campbell, 323.]

THIS was an action for a libel upon the plaintiff in the shape of a caricature print, entitled, "The inside of a parish workhouse, with all abuses reformed."

<sup>1</sup> See *Watts v. Fraser*, 7 A. & E. 223. — ED.











A witness stated that, having heard the defendant had a copy of this print, he went to his house and requested liberty to see it. The defendant thereupon produced it, and pointed out the figure of the plaintiff and the other persons it ridiculed.

LORD ELLENBOROUGH ruled that this was not sufficient evidence of publication to support the action, and

*The plaintiff was nonsuited.*<sup>1</sup>

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CLUTTERBUCK v. CHAFFERS.

AT NISI PRIUS, CORAM LORD ELLENBOROUGH, C. J., DECEMBER 14, 1816.

[Reported in 1 Starkie, 471.]

THIS was an action for the publication of a libel.

The witness who was called to prove the publication of the libel (which was contained in a letter written by the defendant to the plaintiff) stated on cross-examination that the letter had been delivered to him folded up, but unsealed, and that without reading it, or allowing any other person to read it, he had delivered it to the plaintiff himself, as he had been directed.

LORD ELLENBOROUGH held that this did not amount to a publication which would support an action, although it would have sustained an indictment,<sup>2</sup> since a publication to the party himself tends to a breach of the peace.

*Verdict for the defendant.*<sup>3</sup>

<sup>1</sup> See *Gordon v. Spencer*, 2 Blackf. 286. — ED.

<sup>2</sup> "In the case in the Star-chamber between Edwards, a physician, plaintiff, and Wooton, a doctor in physic, defendant.

"The case was, 'that Dr. Wooton writ to Edwards, an infamous, malicious, scandalous, obscene letter, to which he subscribed his name; and this he sealed and directed, To his loving friend Mr. Edward Speed, this; and after, the said doctor published and dispersed to others a great number of copies of the said letter.'

"And it was resolved by the Lord Chancellor Egerton, the two Chief Justices, *et per totam curiam*, that this was a subtle and dangerous kind of libel; for inasmuch as the writing of a private letter to another, without any other publication, the party to whom it is directed cannot have an action *sur le case* for this, that no action lies; but when it is published to others to the scandal of the plaintiff, as it hath been oftentimes adjudged, an action lieth.

"The doctor thought that this could not be punished in any manner; but it was resolved that the said infamous letter, which in law is a libel, shall be punished (although it was solely writ to the plaintiff without any other publication), in the Star-chamber,

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<sup>3</sup> *Phillips v. Jansen*, 2 Esp. 624; *Ward v. Smith*, 4 C. & P. 305; *McIntosh v. Matherly*, 9 B. Monr. 119; *Lyle v. Clason*, 1 Caines, 581; *Waistel v. Holman*, 2 Hall, 172; *Fonville v. McNease*, Dudley, 303, acc. — ED.

## DELACROIX v. THEVENOT.

AT NISI PRIUS, CORAM LORD ELLENBOROUGH, C. J., MARCH 4, 1817.

*[Reported in 2 Starkie, 63.]*

THIS was an action for a libel and slanderous words. The libel was contained in a letter directed to plaintiff.

A clerk of the plaintiff proved that he had received the letter; that it was in the handwriting of the defendant; and that in the absence of the plaintiff he was in the habit of opening letters directed to him which were not marked "private." He further stated that defendant, who was well acquainted with the plaintiff, was aware of the nature of his (the clerk's) employment, and that he believed defendant knew that witness was in the habit of opening plaintiff's letters.

LORD ELLENBOROUGH said that there was sufficient evidence for the jury to consider whether defendant did not intend the letter to come to the hands of a third person, which would be a publication.

*Verdict for plaintiff. Damages, £100.<sup>1</sup>*

## WATTS v. FRASER AND MOYES.

AT NISI PRIUS, CORAM LORD DENMAN, C. J., DECEMBER 5, 1835.

*[Reported in 7 Carrington & Payne, 369.]*

CASE for two libels contained in a periodical work called "Fraser's Magazine," of which the defendant Fraser was the editor, and the defendant Moyes the printer. Plea: General issue.

for that it is an offence to the king, and is a great motive to revenge, and tends to the breaking of the peace and great mischief; and for that reason it was necessary that it should be punished either by indictment or in the Star-chamber, to prevent such occasions of mischief. But in the case at the bar the dispersing of copies of it, or the publication of the effect of it, aggravates the offence, and makes it a new offence; for, for that also the party may have an action *sur le case*.

"Note, that by the civil law, if any person hath (to disable himself to bear any office, or for any other purpose) made a libel against himself, he shall be punished for it. And so it seems to me he should be in the Star-chamber; for this is an offence to the king and the commonwealth; and without question, although that the doctor subscribed his name to the said letter, yet the said letter importing the scandalous matter of a libel, is in the law a libel.

"*Nota*, the law of the Lydians was, that he who slanders another shall be let blood in the tongue, and he who hears it and assents to it, in the ear, &c." Edwards v. Wooton, 12 Rep. 35. Peacock v. Raynel, 2 Brownl. 151; Barrow v. Lewellin, Hob. 62; Hick's Case, Hob. 215; Rex v. Burdett, 4 B. & Ald. 95, acc.—Ed.

<sup>1</sup> Wyatt v. Gore, Holt, 299; Wenman v. Ash, 13 C. B. 836; Kiene v. Ruff, 1 Iowa, 482; Schenck v. Schenck, Spencer, 208; Adams v. Lawson, 17 Gratt. 250, acc. See Callan v. Gaylord, 3 Watts, 321.—Ed.











It appeared that a part of one of the libels was a lithographic print of the plaintiff, which was alleged to be intended to hold him up to ridicule. This print was executed by Mr. Hulmandel, and it appeared that the defendant Moyes had nothing to do with the striking it off. It however appeared that this print was referred to in the letter-press part of one of the articles.

*Erle*, for the defendants. I submit that, at all events, the defendant Moyes is not to be made answerable for the print, and that therefore he must be acquitted. He is a printer; and though he, as such, may be answerable for what comes from his own office, he ought certainly not to be made liable for a print which comes from the lithographic printing office of Mr. Hulmandel, and is never joined to the letter-press till after the work has entirely left Mr. Moyes's office.

LORD DENMAN, C. J. As the print is referred to by the letter-press, I think that the case must go on as to both the defendants.

*Verdict for the plaintiff. Damages, £150.<sup>1</sup>*

In the ensuing term, *Erle* applied for a new trial, upon the ground that a part of one of the libels was a lithographic print, with which it was shown that the defendant Moyes had nothing to do, although it was referred to by the letter-press of part of one of the libels.

*The court refused the rule.*

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## DAY v. BREAM.

AT NISI PRIUS, CORAM PATTESON, J., JULY 17, 1837.

[Reported in 2 Moody & Robinson, 54.]

CASE for a libel. Plea: Not guilty.

The libel complained of was a printed handbill, containing imputations on the plaintiff clearly libellous. The plaintiff lived at Marlborough; the defendant was the porter of the coach-office at that place, and it was his business to carry out and deliver the parcels that came by the different coaches to the office. For the plaintiff it was shown that the defendant had delivered on the same day paper parcels, tied up and containing a large quantity of the handbills in question, to two or three inhabitants of the place, to whom the parcels were directed. No carriage was marked or charged,

<sup>1</sup> Only so much of the case is given as relates to the question of publication.  
—ED.

nor any thing charged for portorage. Nothing was shown to prove that the defendant was aware of the contents of the parcels.

*Bere* submitted that no case was made out to go to the jury.

PATTESON, J., ruled that there was enough to call upon the defendant to show how he became possessed of the parcels.

Witnesses were then called for the defendant, who proved that the parcels in question were some of five, which came by the London coach, inclosed in a large parcel directed to the defendant, each of the inclosed parcels being directed to some inhabitant of the place. The defendant was not charged with any carriage for the parcel, because it was usual to bring things gratis for the servants of the coach proprietors; and he was directed by a proprietor, who happened to be in the office when the parcel arrived, to deliver the inclosed parcels to the persons to whom they were directed.

PATTESON, J., in summing up, left it to the jury to say whether the defendant delivered the parcels in the course of his business without any knowledge of their contents; if so, to find for him, observing, that *prima facie* he was answerable, inasmuch as he had in fact delivered and put into publication the libel complained of, and was therefore called upon to show his ignorance of the contents.

*Verdict for the defendant.*<sup>1</sup>

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## THE DUKE OF BRUNSWICK AND LUNEBERG *v.* HARMER.

IN THE QUEEN'S BENCH, NOVEMBER 2, 1849.

[*Reported in 14 Queen's Bench Reports, 185.*]

CASE. The declaration was dated 27th April, 1848. The first count stated that defendant, to wit, on 19th September, 1830, falsely, wickedly, and maliciously did print and publish, and cause and procure, &c., in a newspaper called "The Weekly Dispatch," a false, &c., libel, containing the false, &c., matter following, of and concerning plaintiff, that is to say, &c. (setting out the alleged libel).<sup>2</sup>

<sup>1</sup> See *Maloney v. Bartlett*, 3 Camp. 210; *Chubb v. Flannagan*, 6 C. & P. 431; 4 M. & Ry. 312 (a); *Dexter v. Spear*, 4 Mason, 115; *Layton v. Harris*, 3 Harringt. 406; *Smith v. Ashley*, 11 Metc. 367; *Viele v. Gray*, 10 Abb. Pr. 7. Conf. *Fox v. Broderick*, 14 Ir. C. L. 453; *Weir v. Hoss*, 6 Ala. 381.—ED.

<sup>2</sup> See *supra*, p. 583, note 1.—ED.

Plea: Statute of Limitations. Replication: That the several grievances in that plea mentioned, and each and every of them, were committed by defendant within six years next before the commencement, &c. Issue thereon.

On the trial, before Lord Denman, C. J., at the sittings in Middlesex, after last Trinity term, the publication of the numbers of the newspaper by the defendant was proved. As to the first plea, so far as related to the first count, two copies of the newspaper containing the libel set out in that count were produced. It appeared to have been published in 1830. One copy was from the British Museum; the other had been purchased before the commencement of the action, in 1848, at the newspaper office of defendant, by a witness, who, on cross-examination, stated that he had been sent by plaintiff to make the purchase, and had handed the paper, when purchased, to plaintiff. For the defendant it was contended that this was not such a publication as would support the issue taken by the plaintiff on the first plea with respect to the first count. The Lord Chief Justice overruled the objection.

Sir *F. Thesiger* now moved<sup>1</sup> for a new trial on the ground of misdirection, and also upon affidavit. This being a civil action, in which the plaintiff complains of being injured by the publication, no publication which he has intentionally caused can support the complaint. It would be otherwise in the case of an indictment, where the question would be whether the public had been injured by an act tending to provoke a breach of the peace. The publication proved was, in law, a publication to the plaintiff himself, which cannot be the foundation of a civil action. Nor is this like the case of a newspaper lately published, where, from a single publication on a particular day, it may be inferred that the newspaper has been recently in circulation elsewhere.

*Cur. adv. vult.*

COLERIDGE, J., in this term (November 16th), delivered the judgment of the court.

In this case we reserved for consideration two points on which it was urged that Lord Denman had misdirected the jury.

Sir *Frederick Thesiger* contended that Lord Denman should have told the jury no publication of the libel in the first count was proved within six years. It appeared that the publication relied on was a sale of a copy of the newspaper to a person sent by the plaintiff to procure it, who, on receiving it, carried it to the plaintiff. It was said that this was a sale to the plaintiff himself, and, therefore, not a sufficient publication to sustain a civil action for damages. And, in some sense, it is

<sup>1</sup> Before Coleridge, Wightman, and Erle, JJ.

true that it was a sale and delivery to the plaintiff; but we think it was also a publication to the agent. The question arises as on a plea of not guilty in an ordinary case. The defendant, who, on the application of a stranger, delivers to him the writing which libels a third person, publishes the libellous matter to him, though he may have been sent for the purpose of procuring the work by that third person. So far as in him lies, he lowers the reputation of the principal in the mind of the agent, which, although that of an agent, is as capable of being affected by the assertions as if he were a stranger. The act is complete by the delivery; and its legal character is not altered, either by the plaintiff's procurement or by the subsequent handing over of the writing to him. Of course that this publication was by the procurement of the plaintiff is not material to the question we are now considering.

We see no ground, therefore, for thinking there was any misdirection.

*Rule refused.*

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### SNYDER v. ANDREWS.

SUPREME COURT, NEW YORK, MARCH 5, 1849.

[*Reported in 6 Barbour, 43.*]

THIS was an action on the case for a libel. The defendant pleaded the general issue, and gave notice of special matter.<sup>1</sup>

The cause was tried at the Saratoga circuit in November, 1847, before Justice Paige. On the trial the defendant admitted that he wrote the letter containing the alleged libel, sealed the same, and put it into the post-office at Saratoga Springs, directed to the plaintiff at his residence. The plaintiff proved by John R. Brown that the letter was read to the witness by the defendant at his office in the presence of a young man who was a clerk of the defendant. The defendant's counsel then moved for a nonsuit, on the ground that a publication of the libel had not been proved. The judge denied the motion.

The jury found a verdict for the plaintiff of \$250. And the defendant, upon a bill of exceptions, moved for a new trial.

*A. Bokes*, for the plaintiff. *D. Wright*, for the defendant.

WILLARD, J. The fact that the defendant read the letter to a stranger, before it was sent to the plaintiff, was not questioned on the trial, and is assumed to be true by the form of the objection; but it is insisted that such reading did not amount to a publication of the libel. No man incurs any civil responsibility by what he thinks or even writes, unless he divulges his thoughts to the temporal prejudice of

<sup>1</sup> See *supra*, p. 583, note 1.











another. Hence, a sealed letter containing libellous matter, if communicated to no one but to the party libelled, is not the foundation for a civil action, although it may be of an indictment. *Lyle v. Clason*; <sup>1</sup> *Hodges v. The State*; <sup>2</sup> *Phillips v. Jansen*.<sup>3</sup> But where the defendant, knowing that letters addressed to the plaintiff were usually opened by and read by his clerk, wrote a libellous letter and directed it to the plaintiff, and his clerk received and read it, it was held there was a sufficient publication to support the action. *Delacroix v. Thevenot*. And in *Schenck v. Schenck*,<sup>4</sup> a sealed letter addressed and delivered to the wife containing a libel on her husband was held a publication sufficient to enable the latter to sustain an action. Reading or singing the contents of a libel in the presence of others have been adjudged a publication. 2 Starkie on Slander, 16; 5 Rep. 125; 9 id. 59 b; 1 Saund. 132, n. 2. The reading of the letter in question by the defendant in the presence of Brown was a sufficient publication to sustain this action. *New trial denied*.<sup>5</sup>

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## SHEFFILL AND WIFE v. VAN DEUSEN AND WIFE.

SUPREME JUDICIAL COURT, MASSACHUSETTS, SEPTEMBER TERM,  
1859.

[Reported in 13 Gray, 304.]

ACTION of tort for slander. Trial in the Court of Common Pleas, before Briggs, J., who signed this bill of exceptions:—

The words claimed to have been slanderous, were spoken, if at all, at the dwelling-house of the defendants, and in that part thereof called the bakery, where bread and other articles were sold to customers, and were spoken by Mrs. Van Deusen to Mrs. Sheffill.

The defendants asked the court to instruct the jury that, if the words alleged in the plaintiffs' declaration were spoken to Mrs. Sheffill, and no other person but Mrs. Sheffill and Mrs. Van Deusen were present, there was no such publication of the words as would maintain the action.

The court declined so to instruct, but did instruct the jury that, if the words were publicly uttered in the bakery of the defendants, there was a sufficient publication, though the plaintiff has not shown that any other person was present at the time they were spoken but Mrs. Sheffill and Mrs. Van Deusen. The jury returned a verdict for the plaintiffs, and the defendants except.

<sup>1</sup> 1 Caines, 581.<sup>2</sup> 5 Humphrey, 112; 1 Wms. Saund. 132, n. 2.<sup>3</sup> 2 Esp. 626; 2 Starkie on Slander (Wend. ed.), 14.<sup>4</sup> 1 Spencer, 208.<sup>5</sup> *M'Coombs v. Tuttle*, 5 Blackf. 431; *Van Cleef v. Lawrence*, 2 City H. Rec. 41, acc.—Ed.

*M. Wilcox*, for the defendants.

*W. K. Peck*, of Connecticut, for the plaintiffs. The instructions given were correct and sufficient. The plaintiffs are not bound to prove, as a distinct fact, that some third person heard the words; those who heard them may be absent or dead. The words having been spoken in a public place, and in a public manner, the presumption is that they were heard by other persons, and so the jury must have thought.

BIGELOW, J. Proof of the publication of the defamatory words alleged in the declaration was essential to the maintenance of this action. Slander consists in uttering words to the injury of a person's reputation. No such injury is done when the words are uttered only to the person concerning whom they are spoken, no one else being present or within hearing. It is damage done to character in the opinion of other men, and not in a party's self-estimation, which constitutes the material element in an action for verbal slander. Even in a civil action for libel, evidence that the defendant wrote and sent a sealed letter to the plaintiff, containing defamatory matter, was held insufficient proof of publication; although it would be otherwise in an indictment for libel, because such writings tend directly to a breach of the peace. So, too, it must be shown that the words were spoken in the presence of some one who understood them. If spoken in a foreign language, which no one present understood, no action will lie therefor. *Edwards v. Wooton*; <sup>1</sup> *Hick's Case*; <sup>2</sup> *Wheeler & Appleton's Case*; <sup>3</sup> *Phillips v. Jansen*; <sup>4</sup> *Lyle v. Clason*; <sup>5</sup> *Hammond N. P. 287*.

It is quite immaterial in the present case that the words were spoken in a public place. The real question for the jury was, were they so spoken as to have been heard by third persons? The defendants were therefore entitled to the instructions for which they asked.

*Exceptions sustained.*<sup>6</sup>

## SECTION II.

### *Libel.*

#### MASON v. JENNINGS.

IN THE KING'S BENCH, MICHAELMAS TERM, 1680.

[Reported in *T. Raymond*, 401.]

IN a special action upon the case. The plaintiff declares that he is a hackney-coachman, and that the defendant with an intent to dis-

<sup>1</sup> 12 Co. 35.

<sup>2</sup> Pop. 139, and Hob. 215.

<sup>3</sup> Godb. 340.

<sup>4</sup> 2 Esp. R. 624.

<sup>5</sup> 1 Caines, 581.

<sup>6</sup> Anon., Sty. 70; *Force v. Warren*, 15 C. B. n. s. 808; *Desmond v. Brown*, 38 Iowa, 13; *Broderick v. James*, 3 Daly, 481, acc. — Ed.









grace him did ride Skimmington, and describes how, thereby surmising that the plaintiff's wife had beat the plaintiff, and by reason thereof persons who formerly used him refused to come into his coach and to be carried by him, *ad damnum*. Upon not guilty pleaded a verdict for the plaintiff; and upon motion in arrest of judgment judgment was given *quod quer nil capiat per billam*; and a judgment in the like case in C.B. was cited Trin. 14 Car. II. C. B. Rot. 1461; in the case of Lumley and Baddenley.

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## AUSTIN v. CULPEPPER.

IN THE KING'S BENCH, MICHAELMAS TERM, 1683.

[Reported in 2 Shower, 813.]

CASE wherein the plaintiff declares that, whereas there was a cause depending in the Court of Chancery between the said parties, and witnesses sworn and examined on the behalf of the plaintiff, the defendant, to scandalize the plaintiff, did forge and counterfeit an order of the said Court of Chancery, that Sir John Austin should stand committed, unless cause, &c., and this did cause to be written and published as an order of the said court; and afterwards, viz., the same day, did make the picture or representation of a pillory, and under the same did write these words: "For Sir John Austin, and his suborned, forsworn witnesses," &c.

*Mr. Pollexfen* moves in arrest of judgment. This declaration consists of two parts, viz., the forgery of the order and the figure with the words underwritten, and the damages are entire; now, if either of them be not actionable, the plaintiff ought not to have judgment. Suppose a man should bring an action for a malicious prosecution of a crime, and for words imputing the same crime, and damages given entirely, if the words happen not to be actionable, it will be naught. Then, for the words themselves, if they had been spoken, they had not been actionable; for to call a man "forsworn" is not actionable, unless it appear that it was in a court of justice. Now, the forgery itself is not actionable, for he lays no damage or trouble accrued to him thereby.

*Mr. Holt*, e contra. It is all but one complicated act, and the action is for libelling him in that manner. Now, supposing the words themselves were not actionable, yet, being published by way of libel, they are so. There was the case of *Col. King v. Lake*,<sup>1</sup> before Lord Hale, where the action was for printing a petition, which he delivered to

<sup>1</sup> Mod. 58.



several members of the House of Commons (having a complaint there against him), containing scandalous matter concerning him, as that he was dishonest and unjust, and had abused him; and, although none of these words printed would have borne an action if spoken, yet the action was held to lie, and judgment was affirmed upon a writ of error. An action lies for a libel as well as an indictment; and a libel may be either *per scripta* or *per signa*. And here was the case of Mingey v. Moodie, where an action was brought for riding Skimmington, as it is called.

*Per Curiam.* It is but one complicated act; and an action lies for scandalizing a man by writing those words, which will not, being spoken, bear an action. Here was the cause of Sir William Bolton v. Deane, for carrying a fellow about with horns, and bowing at his door, &c.

And by the whole court,      *Judgment was given for the plaintiff!*

## CROPP v. TILNEY.

IN THE KING'S BENCH, MICHAELMAS TERM, 1693.

[Reported in 3 Salkeld, 225.]

UPON a writ of error on a judgment in an action on the case, wherein the plaintiff declared that he stood to be elected for a member of Parliament, and that the defendant caused a libel to be printed of him with these words, as spoken by the plaintiff, viz., "There is a war with France, of which I can see no end, unless the young gentleman on the other side of the water" (*innuendo* the Prince of Wales) "be restored," *per quod* he lost his election, *ad damnum*, &c., there was a verdict for the plaintiff, and judgment in C. B.; and now, upon a writ of error in B. R., it was insisted that an *innuendo* cannot beget an action, nor make that certain which was uncertain before, and that here was no scandal; and if so, this was not a libel.

1 "Every infamous libel *aut est in scriptis, aut sine scriptis*; a scandalous libel *in scriptis* is, when an epigram, rhyme, or other writing is composed or published to the scandal or contumely of another, by which his fame and dignity may be prejudiced. And such libel may be published: 1. *Verbis aut cantilenis*, as where it is maliciously repeated or sung in the presence of others. 2. *Traditione*, when the libel or any copy of it is delivered over to scandalize the party. *Famosus libellus sine scriptis* may be: 1. *Picturis*, as to paint the party in any shameful and ignominious manner. 2. *Signis*, as to fix a gallows, or other reproachful and ignominious signs at the party's door or elsewhere." The Case de Libellis Famosis, 5 Rep. 125 b; King v. Lake, Hardr. 470, acc. — Ed.









*Sed per Holt, C. J.* Scandalous matter is not necessary to make a libel; it is enough if the defendant induces an ill opinion to be had of the plaintiff, or to make him contemptible and ridiculous, as, for instance, an action was brought by the husband for riding Skimmington, and adjudged that it lay, because it made him ridiculous and exposed him. Every man understands who is meant by the young gentleman on the other side of the water. If words are false, the defendant may justify in an action, but not in an indictment.

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VILLERS v. MONSLEY.

IN THE COMMON PLEAS, EASTER TERM, 1769.

[*Reported in 2 Wilson, 403.*]

ACTION upon the case against the defendant for maliciously writing and publishing a libel upon the plaintiff in the words following, viz.:—

“ Old Villers, so strong of brimstone you smell,  
 As if not long since you had got out of hell;  
 But this damnable smell I no longer can bear,  
 Therefore I desire you would come no more here.  
 You old stinking, old nasty, old itchy old toad,  
 If you come any more you shall pay for your board;  
 You'll therefore take this as a warning from me,  
 And never more enter the doors, while they belong to J. P.  
 Wilncoat, December 4, 1767.”

The defendant pleaded not guilty. A verdict was found for the plaintiff and sixpence damages, at the last assizes for the county of Warwick. And now it was moved by Serjeant Burland in arrest of judgment that this was not such a libel for which an action would lie; that the itch is a distemper, to which every family is liable; to have it is no crime, nor does it bring any disgrace upon a man, for it may be innocently caught or taken by infection; the small-pox or a putrid fever are much worse distempers; the itch is not so detestable or so contagious as either of them, for it is not communicated by the air, but by contact or putting on a glove or the clothes of one who has the itch; and although it be an infectious distemper, yet it implies no offence in the person having it, and therefore no action will lie for saying or writing that a man has got the itch. It is not like saying or writing that a man has got the leprosy, or is a leper, for which an action upon the case will lie, because a leper shall be removed from the society of men by the writ *de leproso amovendo* (1 Roll. Abr. 44; Cro. Jac. 144; Hob. 219), although it be a natural infirmity.









would not lie; but if he should write those words of another, and publish them maliciously, as in the present case, I have no doubt at all but the action well lies. What is the reason why saying a man has the leprosy or plague is actionable? it is because the having of either cuts a man off from society; so the writing and publishing maliciously that a man has the itch and stinks of brimstone cuts him off from society. I think the publishing any thing of a man that renders him ridiculous is a libel and actionable, and in the present case am of opinion for the plaintiff. Judgment for the plaintiff, *per tot. cur.*, without granting any rule to show cause.

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### BELL v. STONE.

IN THE COMMON PLEAS, NOVEMBER 19, 1798.

[*Reported in 1 Bosanquet & Puller, 331.*]

ACTION on the case for defamation. The first count of the declaration, after stating that the plaintiff was a land-surveyor, averred that the defendant, intending to injure him in his reputation and hurt him in his profession, wrongfully and maliciously wrote and published a certain scandalous, malicious, and defamatory libel in the form of and as a letter addressed to one N. B., to whom the defendant was indebted in a large sum of money, in which letter was contained, of and concerning the plaintiff, the following matter: "After the communication I had with your son in your absence, I but little thought you would have been made the dupe of one of the most infernal villains that ever disgraced human nature; but I suppose you were deceived by those whom you thought well of, and whom he will deceive if they will give him an opportunity; I am told they are respectable; and how they can be connected with him is the most astonishing thing to me. Mr. H. writes me you called upon him (meaning the plaintiff) on the subject of your account, for which the villain gave you his note at five months;" that the defendant, in further prosecution of his said malice, sent the said letter to the said N. B., to the great hurt, prejudice, and injury of the plaintiff, and to his great discredit and disgrace. There were other counts on words spoken in derogation of the plaintiff's professional character, and of his ability to pay his debts. The conclusion, referring to all the counts, stated that the plaintiff suffered special damage in consequence of publishing the said libel and speaking the said words, viz., that he was arrested by the said N. B. for the sum which he owed to him, and that he lost his business, &c.

Plea: The general issue.

This came on to be tried at the Bedford summer assizes, when, the plaintiff having failed in proving the special damage laid, Macdonald, C. B., was of opinion that the letter on which the first count proceeded, unsupported by proof of special damage, was not actionable, and directed a verdict for the defendant. The counsel for the plaintiff, however, contending that the letter itself was actionable, the Chief Baron asked the jury what damages they would give, supposing the plaintiff entitled to a verdict in point of law. The jury answered 1s.

*Sellon*, Serjt., on a former day obtained a rule to show cause why the verdict for the defendant should not be set aside, and a verdict be entered on the first count for the plaintiff for 1s., on the ground that though the words in the first count might not be actionable, if only spoken, yet that being committed to writing, they were so.

*Le Blanc*, Serjt., was this day to have shown cause, but the court expressing themselves clearly of opinion that any words written and published, throwing contumely on the party, were actionable, *Le Blanc* declined arguing the point, and the

*Rule was made absolute.*<sup>1</sup>

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### THORLEY v. LORD KERRY.

IN THE EXCHEQUER CHAMBER, MAY 9, 1812.

[Reported in 4 Taunton, 355.]

THIS was a writ of error brought to reverse a judgment of the Court of King's Bench. "This was an action for a libel contained in a letter addressed to Lord Kerry, and sent open by one of his servants, who became acquainted with its contents. The libel charged his Lordship with being a hypocrite, and using the cloak of religion for unworthy purposes."<sup>2</sup> Upon not guilty pleaded, the cause was tried at the Surrey spring assizes, 1809, when the writing of the letter by the defendant was proved, and that he delivered it unsealed to a servant to carry, who opened and read it; a verdict was found for the plaintiff with £20 damages, and judgment passed for the plaintiff without argument in the court below. The plaintiff in error assigned the general errors.

*Barnewall*, for the plaintiff in error, in Trinity term, 1811, argued, that there were no words in this case for which, if spoken, the action

<sup>1</sup> *Hillhouse v. Duning*, 6 Conn. 391; *Gage v. Robinson*, 12 Ohio, 250. — ED.

<sup>2</sup> This short statement of the case, taken from 3 Camp. 214, has been substituted for the declaration which is set out at considerable length in the original report. — ED.









would be maintainable, and he denied that there was any solid ground, either in authority or principle, for the distinction supposed to have prevailed in some cases, that certain words are actionable when written, which are not actionable when spoken. He contended that all actionable words were reducible to three classes: 1. Where they impute a punishable crime; 2. Where they impute an infectious disorder; 3. Where they tend to injure a person in his office, trade, or profession, or tend to his disherison, or produce special pecuniary damages. 1 Roll. Abr. *Action sur Case pur parols passim*; Co. Dig. *Action upon the Case for Defamation, passim*. And these words do not come within either of those classes. Neither of those books recognize the distinction between written and unwritten slander. All the older cases treat them on the same footing. *Brook v. Watson*.<sup>1</sup> "He is a false knave, and keepeth a false debt-book, for he chargeth me with the receipt of a piece of velvet which is false." The words were held not to be actionable, and no such distinction was there taken. So *Boughton v. Bishop of Coventry and Lichfield*.<sup>2</sup> The words, "he is a vermin in the commonwealth, a false and corrupt man, a hypocrite in the church of God, a false brother amongst us," were held not actionable. There is also a material distinction, which has been overlooked in all the cases, between those words which, tending to irritate and vilify, are indictable, because they conduce to a breach of the peace, and those which are of themselves actionable, the latter class being by no means so extensive as the former. Comyns, in his Dig., Libel, A, 3, when he cites Fitzg. 121, 253, that it is a libel if he publishes in writing, though in words not actionable, is considering this matter wholly in a criminal point of view. The last-mentioned distinction must necessarily exist, because the ground of action is the amount of the civil injury sustained by the plaintiff, not the immorality of the act of the defendant. In the case of *King v. Lake*,<sup>3</sup> indeed, which was an action for words in an answer to a petition preferred by the plaintiff to the House of Commons against the defendant, Hale, C. B., held, that although general words spoken once, without writing or publishing them, would not be actionable, yet there, they being writ and published, which contains more malice than if they had been once spoken, they were actionable. And the court being all of that opinion, judgment was given *pro querente nisi causa, &c.* But in that case, this ground was unnecessary to support the decision, for the words imputed violence, seditious language, illegal assertions, ineptitudes, imperfections, gross ignorances, absurdities, and solecisms, and were laid to be spoken to the plaintiff's damage in his good name and credit, and profession as a bar-

<sup>1</sup> Cro. Eliz. 403.<sup>2</sup> Anderson, 119.<sup>3</sup> Hardr. 470.



rist at law. And in 2 Vent. 28, another action was brought within five years after, between the same parties, for a letter written by the same defendant to the Countess of Lincoln, damnifying the plaintiff in his profession of a barrister; but although Vaughan, C. J., contrary to Wyld, Tyrrell, and Archer, JJ., held that the action lay not, the court did not at all advert to the distinction between written and unwritten slander, in support of their judgment. The distinction was indeed noticed in *Harman v. Delany*; but the same case is reported by Strange, vol. ii. 898, who was of counsel in the cause, and who puts it merely on the ground of its being spoken of the plaintiff in his profession. In *Onslow v. Horne*, it is held that even words imputing a crime are not actionable, unless the punishment be infamous. In *Savile v. Jardine*, it was held that the word "swindler," when spoken, was not actionable; and the distinction was there, indeed, assumed, and the case is thereupon argued to be reconcilable with *J'Anson v. Stuart*,<sup>1</sup> where the same word written was held actionable; but in the latter case is an *innuendo*, that the defendant intended an obtaining money under false pretences, which incurs an infamous punishment, and is therefore clearly actionable, without recurring to the support of this disputed distinction. In the precedents in Rast. 12, 13, Robins. Ent. 72, the words are not stated as a libel; it seems the distinction was unknown. In *Crop v. Tilney*, the words were certainly seditious, if not treasonable. The reason assigned, that the printing or writing indicates a greater degree of malice than mere speaking, is a bad one; for it is not the object of an action at law to punish moral turpitude, but to compensate a civil injury; the compensation must be proportionate to the measure of the damage sustained: but it cannot be said that publication of written slander is in all cases attended with a greater damage than spoken slander; for if a defendant speaks words to a hundred persons assembled, he disseminates the slander and increases the damage a hundredfold, as much as if he only wrote it in a letter to one.

*Dampier*, in affirmance of the judgment. This action is maintainable, first, because the plaintiff is a peer of the realm; and many things are actionable when spoken of a peer, which are not actionable if spoken of a private person; as in the Marquis of Dorchester's Case:<sup>2</sup> "He is no more to be valued than that dog that lies there." So in the case of the Earl of Peterborough v. Stanton:<sup>3</sup> "The Earl of Peterborough is of no esteem in this country; no man of reputation has any esteem for him; no man will trust him for two-pence; no man values him in the country; I value him no more than the dirt

<sup>1</sup> 1 T. R. 478.<sup>2</sup> Mich. 24 Car. II. B. R. Bull. N. P. 4.<sup>3</sup> Ibid.









under my feet." It does not appear that either of these was an action of *scandalum magnatum*. The case of the Earl of Peterborough v. Williams,<sup>1</sup> is indeed there said to be *scandalum magnatum*. The principle on which actions may be sustained for words is rather narrowly laid down in the argument for the plaintiff in error, when the causes of action are said to be only crime, pecuniary damage, and infectious disease. The gist of the last is, that the imputation deprives the plaintiff of society. But what can more deprive a man of society than this imputation of being one "who, under the cloak of religion and spiritual reform, hypocritically and with the grossest impurity deals out his malice, uncharitableness, and falsehoods?" If this is not a leprosy of the mind as much to be shunned as that of the body, the loss of society is not much to be regretted. If Lake's Case had gone upon his loss as a barrister, there would have been no room for all the discussion that took place; and especially Hale's judgment, taking the distinction between speaking and writing. [HEATH, J. It appears by Skin. 124, that the judgment in the case of King v. Lake was affirmed in error.] Austin v. Culpepper. The same distinction is taken in Shower, 314, though it is not taken in Skinner, where the libel imputed perjury, and was therefore clearly actionable. 1 Ford, MS. 49, the case of Harman v. Delany, is reported more fully than in the printed report; and it is there said that it was so agreed by the court. 2 Ford, 78, 79, Bradley v. Methuen; it there appears that Lord Hardwicke recognized the distinction, though it was not absolutely necessary to the judgment, which there passed for the plaintiff. There is another principle upon which the action for slander is to be maintained beyond that of penalty and punishment, viz., of disgrace and discredit; and whether that be produced by writing, or by words, if it is punishable by indictment as tending to a breach of the peace, it is also the subject of a civil action, which may be brought to recover a compensation for the injury the plaintiff sustains by being deprived of society, as for a temporal damage. Villars v. Monsley. Bathurst, J., held that writing and publishing any thing of a man that renders him ridiculous is a libel, and actionable; and fully recognized the distinction between written and spoken slander. This case continues the chain from the time of Hale, C. B., 1670, to the time of Wilmot, C. J., within living memory. Bell v. Stone. The court, in the absence of Eyre, C. J., clearly held that written words of contumely were actionable. [MACDONALD, C. B. Villain was the word there.] This brings us down to Kaye v. Bayley,<sup>2</sup> where the amount of damages made

<sup>1</sup> Comb. 43; 2 Show. 505.

<sup>2</sup> One of the parties in that case having died pending the writ of error, no judgment ever was given.

the question of importance, and it was thrice fully argued. If this series of one hundred and fifty years' decisions (and it was a very learned person, Le Blanc, then serjeant, who refused to argue the point in *Bell v. Stone*) will not suffice to warrant the opinion that an action will lie in such case, there is no reliance to be placed on authority. If words imputing a dereliction of every duty of imperfect obligation cannot be made the subject of an action, the law of libel very imperfectly guards society.

*Barnewall*, in reply. The court will not be disposed to extend the principle laid down in all the books, limiting the cases in which words are actionable. In 1 Roll. Abr. Case for Slander, and Co. Dig. Action on the Case for Defamation, the written and spoken slander are treated of under one title; and in the older entries there is no difference made in the declarations between written and unwritten slander, except using the word "spoken" instead of "written." In *Villars v. Monsley*, the words imputed an infectious disorder. In *Harman v. Delany* the words were spoken of the plaintiff in his trade as a gunsmith. De Grey, C. J., in Wils. 187, says that to impute to any man the mere defect or want of moral virtue, moral duties, or obligations, which render a man obnoxious to mankind, is not actionable. The case in *Anderson* is in point, that the words here used are not actionable. The injury consists in the evil done to the plaintiff in the minds of others; and if the words, when spoken, be not an injury, they cannot be when written. To hold otherwise would be to make the immorality, and not the damage, the ground of action. *Our. adv. vult.*

MANSFIELD, C. J., on this day delivered the opinion of the court.

This is a writ of error, brought to reverse a judgment of the Court of King's Bench, in which there was no argument. It was an action on a libel published in a letter which the bearer of the letter happened to open. The declaration has certainly some very curious recitals. It recites that the plaintiff was tenant to Archibald Lord Douglas of a messuage in Petersham; that, being desirous to become a parishioner and to attend the vestry, he agreed to pay the taxes of the said house, that the plaintiff in error was churchwarden, and that the defendant in error gave him notice of his agreement with Lord Douglas; and that the plaintiff in error, intending to have it believed that the said earl was guilty of the offences and misconducts thereafter mentioned (offences there are none, misconduct there may be), wrote the letter to the said earl which is set forth in the pleadings. There is no doubt that this was a libel, for which the plaintiff in error might have been indicted and punished; because, though the words impute no punishable crimes, they contain that sort of imputation which is calculated to vilify a man, and bring him, as the books say, into hatred, contempt,











and ridicule; for all words of that description an indictment lies; and I should have thought that the peace and good name of individuals was sufficiently guarded by the terror of this criminal proceeding in such cases. The words, if merely spoken, would not be of themselves sufficient to support an action. But the question now is, whether an action will lie for these words so written, notwithstanding such an action would not lie for them if spoken; and I am very sorry it was not discussed in the Court of King's Bench, that we might have had the opinion of all the twelve judges on the point, whether there be any distinction as to the right of action between written and parol scandal; for myself, after having heard it extremely well argued, and especially, in this case, by Mr. Barnewall, I cannot, upon principle, make any difference between words written and words spoken, as to the right which arises on them of bringing an action. For the plaintiff in error it has been truly urged, that in the old books and abridgments no distinction is taken between words written and spoken. But the distinction has been made between written and spoken slander as far back as Charles the Second's time, and the difference has been recognized by the courts for at least a century back. It does not appear to me that the rights of parties to a good character are insufficiently defended by the criminal remedies which the law gives, and the law gives a very ample field for retribution by action for words spoken in the cases of special damage, of words spoken of a man in his trade or profession, of a man in office, of a magistrate or officer; for all these an action lies. But for mere general abuse spoken, no action lies. In the arguments both of the judges and counsel, in almost all the cases in which the question has been, whether what is contained in a writing is the subject of an action or not, it has been considered whether the words, if spoken, would maintain an action. It is curious that they have also adverted to the question, whether it tends to produce a breach of the peace; but that is wholly irrelevant, and is no ground for recovering damages. So it has been argued that writing shows more deliberate malignity; but the same answer suffices, that the action is not maintainable upon the ground of the malignity, but for the damage sustained. So it is argued that written scandal is more generally diffused than words spoken, and is, therefore, actionable; but an assertion made in a public place, as upon the Royal Exchange, concerning a merchant in London, may be much more extensively diffused than a few printed papers dispersed, or a private letter; it is true that a newspaper may be very generally read, but that is all casual. These are the arguments which prevail on my mind to repudiate the distinction between written and spoken scandal; but that distinction has been established by some of the greatest names

known to the law, Lord Hardwicke, Hale, I believe Holt, C. J., and others. Lord Hardwicke, C. J., especially has laid it down that an action for a libel may be brought on words written, when the words, if spoken, would not sustain it. Com. Dig. tit. Libel, referring to the case in Fitzg. 122, 253, says there is a distinction between written and spoken scandal; by his putting it down there as he does, as being the law, without making any query or doubt upon it, we are led to suppose that he was of the same opinion. I do not now recapitulate the cases, but we cannot, in opposition to them, venture to lay down at this day that no action can be maintained for any words written, for which an action could not be maintained if they were spoken; upon these grounds we think the judgment of the Court of King's Bench must be affirmed. The purpose of this action is to recover a compensation for some damage supposed to be sustained by the plaintiff by reason of the libel. The tendency of the libel to provoke a breach of the peace, or the degree of malignity which actuates the writer, has nothing to do with the question. If the matter were for the first time to be decided at this day, I should have no hesitation in saying that no action could be maintained for written scandal which could not be maintained for the words if they had been spoken. *Judgment affirmed.*<sup>1</sup>

<sup>1</sup> Woodard v. Dowsing, 2 M. & Ry. 74 (Oppressive conduct); Churchill v. Hunt, 1 Chitty, 488 (Heartlessness); Digby v. Thompson, 4 B. & Ad. 821 ("D. has had a tolerable run of luck. He keeps a well spread sideboard; but I always consider myself in a family hotel when my legs are under his table, for the bill is sure to come in sooner or later, though I rarely dabble in the mysteries of *écarté* or any other game. The fellow is as deep as Brockford and as knowing as the marquis. I do dislike this leg-al profession"); Harvey v. French, 1 Cr. & M. 11 ("Threatening letters. The grand jury have returned a true bill against a gentleman named French"); Tuam v. Robeson, 5 Bing. 17 (Bribing a priest to renounce his religion); Cook v. Ward, 6 Bing. 409 (A story of an individual calculated to render him ludicrous); Wakley v. Healey, 7 C. B. 591 ("Whose weekly vocation it is to bring every thing belonging to the profession into disrepute and contempt"); Morgan v. Lingen, 8 L. T. R. n. s. 800 ("Her mind is affected"); White v. Nicholls, 3 How. 266 (Vilifier, &c.); Snowden v. Lindo, 1 Cranch C. C. 569 ("He is a lying, slanderous rascal"); Dexter v. Spear, 4 Mason, 115 (Illicit and criminal intercourse); McDonald v. Woodruff, 2 Dill. 244 ("Stupid ass." "Self-convicted liar." "He is in the pay of the St. Louis tobacco manufacturers"); Weir v. Hoss, 6 Ala. 881 (Indecency, &c.); Lick v. Owen, 47 Cal. 252 (Biography of an individual calculated to render him an object of ridicule); Stow v. Converse, 3 Conn. 325 ("B. openly avowed the opinion that government had no more right to provide by law for the support of the worship of the Supreme Being than for the support of the worship of the devil"); Mix v. Woodward, 12 Conn. 262 (Malpractice in packing a jury); Layton v. Harris, 3 Harringt. 406 (Illegal use of money to influence voters); Johnson v. Stebbins, 5 Ind. 364 (Low and immoral character); M'Gee v. Wilson, Litt. S. C. 187 (Want of chastity); Duncan v. Brown, 15 B. Monr. 186 ("A. would put his name to any thing that B. would request him to sign, that would prejudice C.'s character"); Hagan v. Hendry, 18 Md. 177 ("Guilty of the principle of forgery"); Clark v. Binney, 2 Pick. 113 ("His conduct has been such











## GOLDSTEIN v. FOSS AND ANOTHER.

IN THE EXCHEQUER CHAMBER, JANUARY 29, 1828.

[Reported in 4 Bingham, 489.]

**ERROR.** The plaintiff declared that, whereas he was a merchant of good character, and whereas, before the committing of the grievances complained of, divers persons had been associated together, under the name and description of "The Society of Guardians for the Protection of Trade against Swindlers and Sharpers;" and the defendant Foss, under color and pretence of being the secretary of the said society, had from time to time published, and was accustomed to publish, certain printed reports, for the purpose of announcing and signifying to the members of the said society the names of such persons as were deemed swindlers and sharpers, and improper persons to be proposed to be balloted for as members of the said society.

Yet the defendants, knowing the premises, but greatly envying the happy state of the plaintiff, falsely and maliciously did compose, print, and publish the following false, scandalous, malicious, and defamatory libel of and concerning the plaintiff in the way of his trade and business: "Society of Guardians for the Protection of Trade against Swindlers and Sharpers. — I, Edward Foss, am directed to inform you that the

as to merit the reprobation of every man having a particle of virtue or honor," &c.); Bodwell v. Osgood, 3 Pick. 379 (Want of chastity); Miller v. Butler, 6 Cush. 71 (Indecency); Curtis v. Mussey, 6 Gray, 261 (Legal Jesuitism, and a comparison of plaintiff to Pilate and Judas); Nelson v. Musgrave, 10 Mo. 648 ("He is thought no more of than a horse-thief and a counterfeiter"); Price v. Whiteley, 50 Mo. 439 ("I found an imp of the devil, in the shape of John Price, sitting up on the mayor's seat"); Torrance v. Hurst, 1 Miss. 403 (Returning a false inventory on oath); Thomas v. Croswell, 7 Johns. 264 (Fawning sycophant); Southwick v. Stevens, 10 Johns. 443 ("S. has become insane"); Root v. King, 7 Cow. 613 (Intoxication, &c.); s. p. King v. Root, 4 Wend. 113; Stilwell v. Barter, 19 Wend. 487 (Smuggling goods); Cooper v. Greeley, 1 Den. 347 ("He will not like to bring his suit for libel against us in Otsego, for he is known there," &c.); Perkins v. Mitchell, 31 Barb. 461 ("P. is insane"); Carson v. Mills, 69 N. Car. 122 (Unprincipled conduct, &c.); M'Corkle v. Binns, 5 Binn. 340 ("A. has been deprived of a participation of the chief ordinance of the church to which he belongs, and that, too, by reason of his infamous, groundless assertions," &c.); Pittock v. O'Niell, 63 Pa. 253 (Shameless treachery and hypocrisy); Fonville v. McNease, Dudley, 303 ("You came of good parentage, but you have disgraced it"); Woodburn v. Miller, Cheves, 194 (Slanderer); McBride v. Ellis, 9 Rich. 313 (**OBITUARY.** Departed this life, on the 2d day of April, at Hickory Hill, Mrs. Rebecca McBride, in the 95th year of her age. The editor will publish the above obituary, and oblige the subscriber. Respectfully, W. Bowers"); Williams v. Karnes, 4 Humph. 9 ("I look on him as a rascal, and have watched him for many years"); Colby v. Reynolds, 6 Vt. 489 (Slanderer); Cramer v. Noonan, 4 Wis. 231 (Slanderer); Brown v. Remington, 7 Wis. 462 ("A. is a miserable fellow; the community could hardly despise him worse than they now do"), acc. — ED.

persons undernamed, or using the firm of Goldstein" (meaning the plaintiff), "Castle, & Co., 51 Mark Lane, and Benjamin Porter, baker, Hackney Road, are reported to the society as improper to be proposed to be balloted for as members thereof;" thereby then and there meaning that the said plaintiff was a swindler and a sharper, and an improper person to be a member of the said society.

There were other counts, varying the *innuendoes*, but without the introductory matter as to the Guardian Society. Plea: Not guilty.

At the Middlesex sittings after Hilary term, 1826, a verdict was found for the plaintiff, damages £150; but, judgment having been arrested in the Court of King's Bench, on the ground that the *innuendo* was not warranted by the libel, and that the society mentioned in the libel was not averred to be the same society as that mentioned in the introductory matter,<sup>1</sup> the present writ of error was brought.

*F. Pollock*, for the plaintiff, contended that the name of the society, mentioned in the introductory part of the declaration, being the same as that mentioned in the libel, and it nowhere appearing that there were two societies of that name, the society mentioned in the libel was sufficiently connected with that mentioned in the introductory part of the declaration; if so, the *innuendo* attached to the libel was sufficiently warranted by the preliminary allegation, that it was the practice of the defendant, as secretary of the society, to publish reports specifying the names of persons who were swindlers, and improper persons to become members of the society. But, inasmuch as a libel might be conveyed in any terms, however innocent in themselves, provided the parties employing them were agreed to take them in the libellous sense, if a jury found that the sense intended was correctly conveyed by the *innuendo*, any defect of introductory allegation would be cured by verdict. *Coles v. Haveland*; <sup>2</sup> 1 Wms. Saund. 227, n. 1

*Campbell*, contra. Without an *innuendo*, the letter complained of is no libel. But without introductory averments an *innuendo* cannot extend the meaning of words, or affix to them a sense which they do not usually bear; much less can it introduce any allegation of fact. 1 Wms. Saund. 243, n. 4; *Holt v. Scholefield*, per Lawrence, J., in *Hawkes v. Hawkey*; <sup>3</sup> *Barham's Case*. The allegation in this *innuendo*, that by saying the plaintiff was an improper person to belong to the Guardian Society the defendant meant he was a swindler, is a departure from the ordinary meaning of the words, which could only be warranted by a previous averment, that it was the practice of the defendant and the Guardian Society to designate swindlers by the term "improper persons." There being no such averment with which the *innuendo* can be connected, the finding of the jury does not mend the plaintiff's case. Such a finding might cover a good title to damages defectively

<sup>1</sup> 6 B. & C. 154.

<sup>2</sup> Cro. Eliz. 250.

<sup>3</sup> 8 East, 427.









stated, but not a defective title. But the plaintiff has no title to damages, unless he first alleges and proves that it was the custom of the defendant to designate swindlers by the term "improper persons."

*Pollock.* If a libel be written in a foreign language, the office of the *innuendo* is to translate and apply the language to the plaintiff; in doing that, it neither extends the meaning nor makes any allegation of fact: it simply explains the epithets employed; and if the jury finds the explanation, to be correct, the plaintiff's title to damages is complete. The *innuendo* in the present case has done no more; it has explained the meaning of the epithet employed by the defendant; and the jury having been satisfied with the explanation, the plaintiff is entitled to retain his damages. Unless such an *innuendo* were sufficient, it would be impossible to obtain justice against unlawful societies which should adopt a language peculiar to themselves.

BEST, C. J. The court does not entertain the smallest doubt, and the judgment below must be affirmed. It has been urged that, if that judgment be supported, there will be no means of obtaining justice against the society. It would not be difficult, however, so to put a case on the record against the secretary, if he makes a false report, as to try the merits of the proceeding; but on the present record there are not facts enough to show that the construction put upon the libelous words by the *innuendo* is the sense in which they were employed by the defendant. The words do not naturally import that the plaintiff is a swindler; and we want an allegation of fact to prove that they were used in that sense. A man might be improper to be a member of that society if he were old or infirm, or had not a sufficient knowledge of the resorts of swindlers. If the declaration had gone on to aver that it was the custom of the society to designate swindlers by the term "improper persons," the *innuendo* might have been sufficient. But an *innuendo* cannot add a fact, or enlarge the natural meaning of words; and, looking at these words without the allegation of that fact, no one would know that the plaintiff was a swindler, because he was not a proper person for the Guardian Society. The plain ground of our judgment is that we cannot see, on this record, that the plaintiff was charged with having been a sharper or swindler; and this is a defect which the verdict does not cure, the question turning on the construction of words which are not adequately shown to bear any other than their natural meaning. If a verdict were to cure defects of this nature, it would deprive parties of the valuable privilege of an appeal to a court of error, though Mr. Fox's bill expressly reserves the liberty of moving in arrest of judgment. *Judgment affirmed.*<sup>1</sup>

<sup>1</sup> Robinson v. Jermyn, 1 Price, 11 ("J. R., not being a person that the proprietors and annual subscribers think it proper to associate with, is excluded this









been spoken with reference to the business of a coachman, nor appearing to have been attended with special damage, this count cannot be supported. The misconduct charged in the libel is, having insulted some person; which could not subject the party either to an action or to an indictment. [PARKE, J. It charges the party with gross misconduct.] That charge is afterwards explained.

*Chitty*, contra, referred to 3 Bac. Abr. Libel, A, 2.

*Cur. adv. vult.*

BAYLEY, J., on a subsequent day delivered the judgment of the court. There is a marked distinction in the cases between verbal and written slander; the latter being usually attended with more premeditation, and being productive of more extensive and permanent injury than the former. In *King v. Lake*,<sup>1</sup> where the libel charged the plaintiff with having presented a petition "stuffed with illegal assertions, ineptitudes, and imperfections, clogged with gross ignorances, absurdities, and solecisms," Lord Hale said, "that although such general words spoken once, without writing or publishing them, would not be actionable, yet here their being written and published, which contains more malice, they are actionable. In *Cropp v. Tilney*, Lord Holt says, "Scandalous matter is not necessary to make a libel. It is enough if the defendant induces an ill opinion to be had of the plaintiff, or to make him contemptible and ridiculous." So Hawkins, 1 Hawk. P. C. c. 73, § 1, defines a libel as "a malicious defamation expressed in printing or in writing, tending to blacken the memory of one who is dead, or the reputation of one who is alive, and to expose him to public hatred, contempt, or ridicule." This distinction is recognized in *Villers v. Monsley*, *FAnson v. Stuart*,<sup>2</sup> *Bell v. Stone*, *Thorley v. Earl of Kerry*, and in the late case of *Robertson v. M'Dougall*.<sup>3</sup> Here the libel is evidently calculated to bring the party into hatred and contempt.

*Judgment affirmed.*<sup>4</sup>

<sup>1</sup> Hardres, 470.

<sup>2</sup> 1 T. R. 748.

<sup>3</sup> 4 Bing. 670; 1 M. & P. 692.

<sup>4</sup> *Snyder v. Fulton*, 34 Md. 123, acc. — ED.

## FORBES v. KING.

IN THE EXCHEQUER, HILARY TERM, 1833.

[Reported in 1 Dowlings's Practice Cases, 672.]

THIS was an action for libel, brought by Captain Forbes against the publishers of the "Satirist" newspaper. The fifth and eleventh counts were demurred to. The fifth count was upon the following paragraph: "Langford was conversing with his man Friday the other day on the subject of the slave-trade, and enumerating instances of peculiar endowments among the black population. 'Yes,' observed Forbes, 'the history of Hayti affords ample proof that they are equal to us in intellectual endowments.' 'You know, Forbes, I fear, but little of history,' remarked his Lordship, looking into the History of England; 'you will there read an account of a black prince who was the greatest soldier of his time.'" The libel was set out with the usual *innuendoes*, but without any introductory averments.

*Mansel* was called on by the court to support the count. He contended, that to write of another that he was a "man Friday," was actionable. It was an imputation that he was a mere tool, and in a state of subserviency to another; and was calculated to degrade him in public estimation. [LORD LYNDEHURST, C. B. There is no *innuendo* to apply it in that way. We cannot take notice of "Friday." If you had stated, by way of *innuendo*, that by "man Friday" was meant to be imputed degradation to the plaintiff, that might have been sufficient.] They speak of the black population. [GURNEY, B. You do not state you are white. BAYLEY, B. A man may be black, and be a subject of this realm.] You would not call a subject of this realm a member of a black population. I submit, that no one can read this paragraph without seeing that its evident object and tendency is to degrade and vilify the plaintiff.

The eleventh count was upon the following statement: Gambling Fracas.—There was a prevalent rumor in the fashionable circles yesterday, that, in consequence of a dispute at play between Mr. Hugh (calling himself captain) Forbes, and Mr. Tarlton, a gentleman well known in the fashionable world, a meeting was decided on between the mutual friends of the parties, Messrs. Summers and Barnard, and the affair was to come off on Putney Heath at daybreak, on Thursday morning. Mr. Tarlton and his friend Mr. Summers were on the ground, anxiously waiting the arrival of Messrs. Forbes and Barnard; but these gentlemen did not appear. The disappointment, as may be well imagined, excited in the minds of the attendant gentlemen no











very agreeable feelings; and, as soon as it was deemed advisable to leave the ground, Mr. Summers proceeded in search of Barnard (Forbes's second), in order to obtain an explanation of the violation of an engagement that had been settled on all hands, and is usually considered binding. Words led to blows, and blows to a very severe punishment, administered *à la Cribb* on the *corpus* of Barnard by Mr. Summers. We will not now enter on the question further." There were no introductory averments.

*Mansel*, in support of the count. This is a libel tending to hold up the plaintiff to ridicule and degradation. It is headed "Gambling Fracas." Gambling cannot be innocent. To write of a man that he is a gambler, is, I submit, actionable. [BAYLEY, B. Gambling is playing. There may be innocent gambling. Does every dispute at play degrade or make a man contemptible?] He is stated not to have appeared at the ground. [BAYLEY, B. He did right. LORD LYNTHURST, C. B. He did not do what was illegal. He never agreed to it; his second did for him.] It is an imputation upon us to state that we were engaged in the transaction. [BAYLEY, B. That is, that you were engaged in play. There is no other point.] Does not this account hold the plaintiff up to ridicule, and tend to degrade him?

LORD LYNTHURST, C. B. Whether or not a count could be framed upon this statement we do not say. You do not show that he was engaged in illegal play.

BAYLEY, B. Undoubtedly, to write of a man what will degrade him in society is actionable. Here, if you had alleged that illegal play was meant, that might have done.

*Judgment for defendant.*

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## HUNT v. ALGAR.

AT NISI PRIUS, CORAM LORD LYNTHURST, C. B., DECEMBER 2, 1833.

[Reported in 6 Carrington & Payne, 245.]

**LIBEL.** The defendants were the publishers and two of the proprietors of the "True Sun" newspaper, and it appeared that, in that paper of the 18th of December, 1832, the following paragraph was inserted: "Riot at Preston. From the 'Liverpool Courier.'—It appears that Hunt pointed out Counsellor Seager to the mob, and said, 'there is one of the black sheep.' The mob fell upon him and murdered him. In the affray Hunt had his nose cut off. The coroner's inquest have brought in a verdict of wilful murder against Hunt, who is committed to gaol. Fudge!"

The plaintiff, who conducted his cause in person, called a witness who proved that he had searched the files of the "Liverpool Courier," from which the libel purported to be taken, for several months backward, and that the libel was not in it. It turned out, however, on his cross-examination, and that of another of the plaintiff's witnesses, that the paragraph in question did actually appear in a paper called the "Liverpool Journal," which was published four days previous to the "True Sun," and also that the plaintiff had brought an action and recovered damages against that paper, as well as the "Globe." The paragraph also appeared in the "Globe" on the evening previous to the day on which it appeared in the "True Sun;" but neither in the "Liverpool Journal" nor in the "Globe" was the word "fudge" added.

To show the *animus* with which the publication was made, the following paragraph, which appeared in the "True Sun" of the 17th December, 1832, the day previous to the publication of the libel, was given in evidence: "Cobbett is returned; we do heartily rejoice at this: he is a radical worth having. He will add fifty per cent to the interest of the session's debates. He ought to have been returned for Preston when that poor thing Hunt, whom we are glad to see turned out, was elected. Hunt degraded the working classes by his ignorance and his base association with the Tories. If Cobbett, in some of his fits of waywardness, should do the latter, he cannot well do the former. — *Spectator*. The "True Sun" of a subsequent date, giving an account of a meeting of the working classes, stated that the libel was introduced at the meeting; and that when Mr. Hunt rose to address the people he was met by repeated cries of the word "fudge." A witness, however, proved that those cries were made by a person named Carpenter, connected with the "True Sun," and a few others near him; the meeting consisting of nearly 2000 persons. It further appeared that the "True Sun," a few days before the trial, alluding to the libel, said, "we merely copied it from another paper in order to give it an unequivocal denial."

The plaintiff contended that the article was fabricated by the defendants, and that the word "fudge" was merely introduced with reference to the future; that the defendants might afterwards, if the paragraph were complained of, refer to it as showing that they intended to discredit the statement. He also contended that it was a word not to be found in the dictionaries, and of which the meaning was not generally known. He called several witnesses, who stated that they had searched in many dictionaries, and could only find the word in a large edition of Dr. Johnson's dictionary, published within a few years by a Mr. Todd. One of them, a doctor of medicine, said that he saw the word in the









libel, but did not know what it meant in the connection in which it was used; and he considered that, in the Vicar of Wakefield, from which alone its authority was derived, it was used to express contempt for the character of the party speaking, and not as a contradiction of what was considered as untrue. Another, who had been editor of a newspaper, said that he thought it meant stuff and nonsense, but certainly did not consider it as a direct contradiction. Another admitted on his cross-examination that it was in Chalmers's Johnson, in the following manner: "Fudge, an expression of the utmost contempt, usually bestowed on absurd and lying talkers. — Goldsmith." This witness also said that he thought the working classes might understand it in some such sense as that. It was stated that there had been a demurrer, which was overruled.

*Humfrey*, for the defendant Algar. It cannot be believed that the defendants intended to insinuate that Mr. Hunt was a murderer, nor would anybody think that he had been committed for murder. The defendants could not (as the plaintiff wished to make it out) have manufactured the paragraph themselves, because it appeared upon the evidence that it was in the "Liverpool Journal" four days, and in the "Globe" one day, previously to its publication in the "True Sun." The word "fudge" must be taken to mean "stuff and nonsense, and we don't believe it;" and if so, the paragraph is not a libel. As to the demurrer being overruled, all the court did, and all they could say was, that the word "fudge" did not so alter the character of the statement, as that a court of justice could take upon itself to say that it was not a libel, but that it was a question for the jury whether it had that effect or not.

LORD LYNDHURST, C. B. (in summing up), said, this is a question entirely for your decision and consideration. It appears that for articles similar, at least in substance, the plaintiff has brought two actions and obtained verdicts. But notwithstanding, if this be a libel reflecting on his character, he may recover damages in this action also. It is not disputed that, if the paragraph stood without the word "fudge," it would be a libel. That is not the real question at issue between the parties: the question is, with what motive the publication was made. If you are of opinion that the object of the paragraph which appeared in the "True Sun" was to injure Mr. Hunt, then he may maintain the action. On the other hand, if you shall be of opinion, taking the whole together, that the object was to vindicate Mr. Hunt's character from an unfounded charge, then I am of opinion that the action cannot be maintained. The question, therefore, for you will be, with what motive the article was published. With respect to what occurred on the argument of the demurrer, you have nothing to



do with it. The court only decided on the then state of the record, that it was for a jury to say with what motive the publication was made. Mr. Hunt, to show the motive, said that it was not copied from the "Liverpool Courier;" but it turned out afterwards that it had appeared in the "Liverpool Journal." I think this mere mistake of the name does not show any improper motive, when it appears that the "Liverpool Journal" was one of the papers against which Mr. Hunt had brought an action. Then it will be for you to say, the paragraph having appeared in other papers before, what was meant by the addition of the word "fudge." If the word "fudge" was only added for the purpose of making an argument at a future day, then it will not take away the effect of the libel. His Lordship read the evidence, and left the matter to the jury, telling them that the motive of the publisher was the main question, and that the plaintiff only sought to recover nominal damages.

*Verdict for the plaintiff. Damages, one farthing.*

On the following morning Humfrey applied to his Lordship to certify to deprive the plaintiff of costs; but his Lordship refused.

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### CHEESE v. SCALES.

IN THE EXCHEQUER, NOVEMBER 7, 1842.

[Reported in 10 Meeson & Welsby, 488.]

**LIBEL.** The declaration stated that the plaintiff had been and was overseer of the poor of the parish of St. Mary, Stratford-le-Bow, and that the defendant published of and concerning him the libellous matter following: "That the plaintiff, when out of office, had advocated low rates, and when in office had advocated high rates, and that he (the defendant) would not trust the plaintiff with £5 of his private property." Plea: Not guilty. At the trial before Lord Abinger, C. B., at the sittings in London after last Trinity term, the plaintiff obtained a verdict, damages 40s.

*Crowder* now moved in arrest of judgment, and contended that the language imputed to the defendant was ambiguous, and might mean either that the plaintiff was dishonest, or merely that he was negligent of his affairs, and therefore that it was not necessarily libellous, and ought to have been explained by an *innuendo*.

But *per Curiam*. The publication imputes dishonesty to the plaintiff, or at least tends to disparage him; it was for the jury to say









whether it was libellous or not, and they have found that it was. There is no ground for arresting the judgment. *Rule refused.*<sup>1</sup>

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### HOARE v. SILVERLOCK.

IN THE QUEEN'S BENCH, JUNE 27, 1848.

[*Reported in 12 Queen's Bench Reports, 624.*]

**CASE.** The first count of the declaration stated, by way of inducement, that the plaintiff, before and at the times of the committing, &c., was the orphan daughter of Nicholas Hoare, deceased, who in his lifetime had been a lieutenant in the royal navy; and the plaintiff, before and at the said several times, was and still is poor and in distressed circumstances, and had applied to a charitable society called the Royal Naval Benevolent Society for pecuniary assistance. Yet defendant, well knowing, &c., composed and published a libel of and concerning plaintiff; which was then set forth. The second count was for another libel.

The third count stated that defendant further contriving, &c., afterwards, to wit, &c. (25th July, 1846), in a public newspaper called "The Nautical Standard and Steam Navigation Gazette," falsely and maliciously composed and published, and caused and procured to be published, of and concerning plaintiff, and of and concerning her said application to the said society, another false, scandalous, malicious, and defamatory libel, containing, amongst other things, the false, &c., matter following of and concerning the plaintiff, and of and concerning her said application to the said society, viz., "The Royal Naval Benevolent Society. We were sorry to perceive by a report of last Monday's proceedings at a meeting of the above society, that the case of Miss Hoare (meaning the plaintiff<sup>2</sup>), which we imagined had been entirely dismissed by the unanimous decision of a large body of offi-

<sup>1</sup> *J'Anson v. Stuart*, 1 T. R. 748; *M'Gregor v. Thwaites*, 3 B. & C. 33; *Clegg v. Laffer*, 10 Bing. 250; *Turner v. Meryweather*, 7 C. B. 251; *Greville v. Chepman*, 5 Q. B. 781; *O'Brien v. Clement*, 16 M. & W. 159; *Campbell v. Spottiswoode*, 3 B. & S. 769; *Obaugh v. Finn*, 4 Ark. 110; *Wilson v. Fitch*, 41 Cal. 363; *Lindley v. Horton*, 27 Conn. 58; *Robbins v. Treadway*, 2 J. J. Marsh. 540; *Shelton v. Nance*, 7 B. Monr. 128; *Chancey v. Goodrich*, 98 Mass. 224; *Worthington v. Houghton*, 109 Mass. 481; *Keemle v. Sass*, 12 Mo. 499; *Brooks v. Bemiss*, 8 Johns. 455; *Powers v. Dubois*, 17 Wend. 63; *Cramer v. Riggs*, 17 Wend. 209; *Weed v. Foster*, 11 Barb. 203; *Littlejohn v. Greeley*, 13 Abb. Pr. 41; *Simmons v. Morse*, 6 Jones, 6; *Newbraugh v. Curry*, *Wright* (Ohio), 47; *Holt v. Parsons*, 23 Tex. 9; *Adams v. Lawson*, 17 Gratt. 250; *Cramer v. Noonan*, 4 Wis. 231, acc. — Ed.

<sup>2</sup> This *innuendo*, after the mention of Miss Hoare (which it is not thought necessary to repeat), was the only one used in the third and fourth counts.

cers of high rank and distinguished position in the service at the last quarterly court, had been reopened, and that, too, by an officer distinguished no less for his illustrious services against the enemy than his noble descent. The gallant Rear-Admiral the Earl of Cadogan has happily been a stranger to those scenes which have occurred at the former meetings of this society when the case of the above misguided woman has been brought forward. But, if he has escaped the exhibition of such conduct on the part of one or two officers who would by the display be certainly very much lowered in his estimation, his Lordship has unfortunately also missed the hearing of an overwhelming mass of evidence which is a complete justification for the society's decision with respect to the claims of Miss Hoare, to say nothing of the recantation of some who were her warmest friends, and who, in giving up their advocacy of her claims, stated that they had realized the fable of the frozen snake." "Let the noble earl go to the society's offices and examine carefully the documents, and make himself acquainted with the whole of the proceedings of the secretary and the society in this matter, and he must come to the conclusion that the case of Miss Hoare is a most forlorn hope, and that, unfortunately, many much more worthy objects of the society's benevolence are excluded from participation in it by the limited state of its funds."

The fourth count charged, with the same averments as were made in the third, publication in the above-mentioned newspaper by defendant on August 8, 1846, of a libel, containing the following passages: "Sir, having attended the meetings of the Royal Naval Benevolent Society, and witnessed the painful and strong disputes in the case of Miss Hoare, I am led somewhat reluctantly to address these few observations to you in justice to our worthy secretary, and on behalf of our charitable institution, which has been upon recent events the scene of much discord and so very disreputable to the society. The importunities of Miss Hoare and her supporters, although they have been upon every occasion outvoted by a very large majority of the members of the institution, have nevertheless operated in no small degree to suppress the contributions of several benevolent persons who, opposed to strife, would have added their pecuniary assistance to the naval widow and orphan but for our calamitous disunion. For one, I am determined to withdraw my subscription should any of our funds be granted to Miss Hoare; but I hope and trust the good sense of the members at our next meeting will, as heretofore, prevail, and reject for ever the unworthy claims of Miss Hoare." "Bold<sup>1</sup> and strong measures ought

<sup>1</sup> The passage here referred to (of which some lines, not material to the decision of the case, are omitted) formed part of a different letter, but was stated to be contained "in another part of the said libel."











to be adopted to prevent the reopening of Miss Hoare's case, which, in other words, means the renewal of an unjustifiable and apparently vindictive attack on the secretary. Who is this woman, that she is to engross almost the whole of the time of the society? She is not entitled, as the descendant of a subscriber or in her own right, to relief; and it is avowed by her friends that she squandered away the money which she did obtain from the benevolent in printing circulars abusive of Commander Dickson. Really, it is time that all this twaddle about humanity, and this display of knight errantry in defence of a slandered and forlorn damsel, should be laid aside." "The charge must be made against Commander Dickson, and, if it be not made, then let the case of Miss Hoare be buried in oblivion; and let not the discord which it has caused longer prevent the benevolent from subscribing for the widow and orphan," &c.

There was a fifth count for another libel. Plea: Not guilty. Issue thereon.

On the trial, before Coleridge, J, at the sittings in Middlesex after Michaelmas term, 1847, a verdict was found for the plaintiff, and damages assessed generally, on the last three counts.

*Talfourd*, Serjt., in the ensuing term, moved in arrest of judgment, on the ground that the passages declared upon in the last three counts were, on the face of them, not actionable. As to the third count, he contended that the words "frozen snake" could not be deemed libellous, unless shown to be so by an *innuendo*. He cited *Forbes v. King*. [LORD DENMAN, C. J. Suppose the expression had been "dog in the manger;" should you say an *innuendo* was necessary?] A rule *nisi* was granted.

The plaintiff in person now showed cause. As to the third count, the phrase "misguided woman" suggests impropriety of conduct, and is therefore libellous. "Every thing printed or written, which reflects on the character of another, and is published without lawful justification or excuse, is a libel." *O'Brien v. Clement*,<sup>1</sup> judgment of Parke, B. The expression "frozen snake" is known without the help of an *innuendo* to imply treachery and ingratitude. The office of an *innuendo* is only to explain doubtful allusions; and it is not wanted where the matter published of itself imports something disgraceful. *Digby v. Thompson*; <sup>2</sup> *J'Anson v. Stuart*.<sup>3</sup> If the words "frozen snake" required a formal explanation, so would every classical allusion. Could a plaintiff be called upon to prove the existence of a fable of the frozen snake? There could be no formal proof: it is in every one's knowledge. *Forbes v. King* was a very different case from this. One passage com-

<sup>1</sup> 15 M. & W. 435.

<sup>2</sup> 4 B. & Ad. 821.

<sup>3</sup> 1 T. R. 748.

plained of there imputed "gambling" to the plaintiff, but was not shown to charge him with illegal play; the other merely called him the "man Friday" of a person to whom no fault was ascribed but want of historical knowledge. On the latter point, Lord Lyndhurst, C. B., observed that there was no *innuendo*, and said: "If you had stated, by way of *innuendo*, that by 'man Friday' was meant to be imputed degradation to the plaintiff, that might have been sufficient." There was nothing calumnious in the allusion itself, for Friday, in the story referred to, was a virtuous man and good servant: it required an *innuendo* to show how the comparison with him became degrading. But where the allusion is injurious in itself, that decision will not apply; the libellous words alone will bear out the declaration, especially after verdict, though there be an improper *innuendo*, or none. *Archbishop of Tuam v. Robeson*; <sup>1</sup> *Williams v. Gardiner*; <sup>2</sup> *1 Starkie on Slander*, &c. (2d ed.), 428-430, citing *Peake v. Oldham*. "A writing may be so expressed, and in such clear and unambiguous words, as that it may amount of itself to a libel. In such a case, the court wants no circumstances to make it clearer than it is of itself; and, therefore, all foreign circumstances introduced upon the record would be only matter of supererogation. *Rex v. Horne*,<sup>3</sup> judgment of De Grey, C. J. As to the fourth count, the suggestion is, that the meaning of the passages set out is not necessarily injurious. But to say that the plaintiff squandered away money obtained from the benevolent in printing abusive circulars is slanderous; it is imputing an unfeminine course of conduct and a wrongful misappropriation of money. And the paragraphs call upon the members of the society to unite against the claims of Miss Hoare, which are termed "unworthy." That word was much considered, and was held to be scandalous, in *Lord Townsend v. Dr. Huges*.<sup>4</sup> To the fifth count no objection has been stated. [LORD DENMAN, C. J. No doubt that is good. *Talfourd*, Serjt., for the defendant, admitted that he could not object to it. PATTESON, J. In that case, according to the present practice, the motion should be, not to arrest the judgment, but for a *venire de novo*. *Talfourd*, Serjt. It might be so shaped; to assess damages on the good count.]

*Corrie* was heard in support of the rule, *Talfourd*, Serjt., having left the court. The third count does not contain any such charge of a deviation from moral duty as can be deemed libellous. At most, nothing is imputed but want of gratitude. [LORD DENMAN, C. J.

<sup>1</sup> 5 Bing. 17.

<sup>2</sup> 1 M. & W. 245; s. c. Tyr. & G. 578. See *Gardiner v. Williams*, 2 Cr., M. & R. 78; s. c. 5 Tyr. 757.

<sup>3</sup> 2 Cowp. 672, 683.

<sup>4</sup> 2 Mod. 150. (Under 1 Stat. 2 R. II. c. 5.)











Exemplified by stinging those who have encouraged her. That is the meaning of the "frozen snake." Even want of gratitude is a serious imputation.] The mere absence of a moral quality is not such an imputation as can legally be a subject of libel. This case is not distinguishable from *Forbes v. King*. [LORD DENMAN, C. J. The imputation there implied nothing worse than being a black,—a great misfortune, perhaps, but no crime.] The court would not, in the absence of *innuendo*, take notice of the meaning. Suppose the allusion were to an Oriental fable or German story, not generally known except to scholars, would the court recognize the meaning? And where can a line be drawn? As to the fourth count, from all that appears on the record the conduct of the plaintiff might be justifiable, though prejudicial to the society. The abuse she is said to have circulated might be deserved. The contrary does not appear. In *Robinson v. Jermyn*<sup>1</sup> the declaration stated that there was a room at Southwold called the "Casino," frequented by subscribers thereto; that plaintiff was the officiating minister of a parish in the county where the room was situate; and that the defendants published of and concerning him the following words: "The Rev. John Robinson," "and Mr. James Robinson," "inhabitants of this town, not being persons that the proprietors or annual subscribers" "think it proper to associate with, are excluded this room;" and these words were held too indefinite to support a declaration for libel.

LORD DENMAN, C. J. There is no ground for our interference. The third count is certainly good. We are not called upon here to take judicial notice that the term "frozen snake" had or had not the meaning ascribed to it by the plaintiff, but to say, after verdict, whether or not a jury were certainly wrong in assuming that those words had the particular meaning. They are words well understood; there is no doubt that they are commonly known in a libellous sense; it must here have been left to the jury to say whether they were used in that sense or not; and we must take it that they considered them as so applied. None of the cases sustain the objections here made. In *Robinson v. Jermyn*<sup>1</sup> the supposed libel alleged only that the proprietors of a subscription room did not think the plaintiff a fit person for their company, and therefore excluded him from their room, which might be rather a compliment than a reproach. The "Friday" alluded to in *Forbes v. King* was a very respectable person; black men have not been declared to be criminal by any act of Parliament. The fourth count is certainly injurious to the plaintiff; for it describes her as an applicant to the society for charity, but unfit to receive it, because she employs the money she obtains from the benevolent in circulating abuse of the secretary.

<sup>1</sup> 1 Price, 11.

PATTESON, J. The principal question before us has been whether these words, "to say nothing of the recantation of some who were her warmest friends, and who, in giving up their advocacy of her claims, stated that they had realized the fable of the frozen snake," could import on the face of them any thing slanderous. If they could not, I am not prepared to say that judgment should not be given for the defendant on the third count, as upon demurrer. But, if they are capable of a libellous sense, it may be material that the jury has found that they were used in that sense. Then, as to the question whether an *innuendo* was necessary, I think it was not. Any ordinary person would be able to say what the allusion was; and the jury have found it. As to the fourth count, the expression "unworthy claims" alone is strong; and then it is added, "Who is this woman that she is to engross almost the whole of the time of the society? She is not entitled, as the descendant of a subscriber or in her own right, to relief; and it is avowed by her friends that she squandered away the money which she did obtain from the benevolent in printing circulars abusive of Commander Dickson." These words manifestly infer misconduct, and tend to bring the plaintiff into contempt, and set the readers against her as a person who has misconducted herself towards this society.

COLERIDGE, J. As to the necessity of an *innuendo*, the jury and court in such a case as this are in an odd predicament, if they alone of all persons are not to understand the allusion complained of. Suppose the libel had said the plaintiff acted like a Judas, must the history of Judas have been given and referred to by *innuendo*? We ought to attribute to a court and jury an acquaintance with ordinary terms and allusions, whether historical or figurative or parabolical. If an expression, originally allegorical, has passed into such common use that it ceases to be figurative, and has obtained a signification almost literal, we must understand it as it is used. Half of our language is founded upon allegorical allusion: "vinegar" is talked of in describing a bad temper; even the word "sour" is figurative. We must understand such terms according to the sense which has become familiar.

ERLE, J. In this case the jury has decided on the sense of the words mentioned in the third count; and we cannot arrest the judgment, unless we see, on reading the whole passage complained of, that there could be no ground for the construction they have adopted. Nothing is easier than to bring persons into contempt by allusion to names well known in history, or by mention of animals to which certain ideas are attached; and I may take judicial notice that the words "frozen snake" have an application very generally known indeed, which appli-









cation is likely to bring into contempt a person against whom it is directed. I also think the fourth count libellous, by the tendency it has to lower the plaintiff's character. *Rule discharged.*

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## FRAY v. FRAY.

IN THE COMMON PLEAS, NOVEMBER 21, 1864.

*[Reported in 17 Common Bench Reports, New Series, 603.]*

THIS was an action for a libel. The declaration stated that the defendant falsely and maliciously wrote and published of the plaintiff, in the form of a letter addressed to the clerk to the guardians of a certain poor-law union, in respect of an allowance by the said guardians towards the maintenance of his, the defendant's, mother, being also the mother of the plaintiff, the words following that is to say, "I (meaning the defendant) do not know what grounds she (meaning the said mother of the plaintiff and the defendant) can have to claim off your board out-door relief. You will find that she (meaning the said mother of the plaintiff and the defendant) does not belong to your parish: in fact, Mr. Phillips, your relieving officer, informed me (meaning the defendant), by letter, more than twelve months ago, that her (meaning the plaintiff's and defendant's said mother's) parish was Llanfair, Waterdine, Salop, a more fitting place for her (meaning the plaintiff's and defendant's said mother) to end her days than Newtown; but her removal would not suit Miss Fray's (meaning the plaintiff's) purpose. Again, I (meaning the defendant) say, if she (meaning the plaintiff's and the defendant's said mother), is a pauper, she (meaning the plaintiff's and defendant's said mother) is not justified in renting a cottage and paying rates and taxes. It is only done to keep a home for Miss Fray (meaning the plaintiff), who (meaning the plaintiff) has for years, without the slightest cause, systematically done every thing she (meaning the plaintiff) can to annoy me (meaning the defendant); and I (meaning the defendant) am sorry to say my mother (meaning the said mother of the plaintiff and the defendant) is only too glad to assist her (meaning the plaintiff). Some years ago, they (meaning the plaintiff's and the defendant's said mother and the plaintiff) dragged me (meaning the defendant) into chancery, as well as Mr. Drew; and almost every term I (meaning the defendant) am obliged to appear by counsel before the Vice-Chancellor. They (meaning the plaintiff's and the defendant's said mother and the plaintiff) had no business to include me



(meaning the defendant) in the bill, as I (meaning the defendant) make no claim to my (meaning the defendant's) late father's property; but, of course, it is a pleasure to my mother (meaning the plaintiff's and the defendant's said mother) and Miss Fray (meaning the plaintiff) to put me (meaning the defendant) to all the expense they (meaning the plaintiff's and defendant's said mother and the plaintiff) can. My (meaning the defendant's) solicitor has had notice to appear again in November. The cost I (meaning the defendant) have been put to is something considerable; and how I (meaning the defendant) am to obtain the money to pay my (meaning the defendant's) solicitor, I (meaning the defendant) do not know. Doubting, as I (meaning the defendant) do, my mother's (meaning the plaintiff's and the defendant's said mother) extreme poverty, I (meaning the defendant) think the proper test of it is an order for the workhouse; the expense of which should be borne proportionately between all her children; and as Miss Fray (meaning the plaintiff) is a lady of independence, and a single woman, and can find the money for carrying on all sorts of law proceedings, she (meaning the plaintiff) should not be exempted." Claim, £200.

The defendant demurred to this declaration; the ground of demurrer stated in the margin being, "that the words set forth in the declaration do not amount to a libel." Joinder.

*Inderwick*, in support of the demurrer, submitted that the letter declared upon was clearly not libellous, for that, to constitute a publication libellous, it must be such as is calculated to bring the party libelled into hatred and contempt with his fellow-subjects, or charges him with some offence for which if guilty he would be liable to be indicted, or the like: whereas, here, the *gravamen* of the charge is, that the plaintiff is a litigious person, without even suggesting that she is actuated by animosity against the writer, or by any improper motives. [ERLE, C. J. That which may tend to lower the plaintiff in the estimation of others, we cannot withhold from a jury.] The question is, whether this can be a libel. There should be at least some *scintilla* of injury. [ERLE, C. J. The statute 32 Geo. III. c. 60, is in terms applicable only to criminal cases; but it has always been adopted in practice in civil actions.] In *Baylis v. Lawrence*,<sup>1</sup> Lord Denman says: "If the judge and jury think the publication libellous, still, if on the record it appears not to be so, judgment must be arrested."

Miss Fray appeared in person to support the declaration.

ERLE, C. J. We cannot take upon ourselves to hold that the letter

<sup>1</sup> 11 Ad. & E. 920; 3 P. & D. 526.









in question can under no circumstances be libellous. The matter must go before a jury.

The rest of the court concurring, *Judgment for the plaintiff.*

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COX v. LEE.

IN THE EXCHEQUER, JUNE 3, 1869.

[*Reported in Law Reports, 4 Exchequer, 284.*]

DECLARATION: First count, on a libel published in the "Leicester Mail" by the defendant of the plaintiff, as proprietor and publisher of the "Leicester Advertiser," in the following words: "That the 'Advertiser' should disparage Mr. Frewen is hardly accounted for by a little incident related the other night to his constituents by Mr. Frewen, except that that excellent educator of the people adds to numerous other virtues not mentioned in the litany that which all true Englishmen abominate most, — ingratitude." Second count, on another libel published in the "Leicester Mail" by the defendant of the plaintiff in relation to his being proprietor and publisher of the "Leicester Advertiser." The libel set out contained an account of a public meeting held at Leicester, and addressed by Mr. Frewen as candidate for the northern division of Leicestershire. At this meeting Mr. Frewen read a passage from the plaintiff's paper, the "Leicester Advertiser," which was as follows: "After the unsuccessful attempts of Mr. Frewen, in some of which we accorded him our support, to obtain one of the seats of the northern division, we feel compelled to state our opinion that his indiscretion in making the present attempt can have no other effect than that of disquieting the conservative ranks, and of affording to the opposite political party an opportunity of testing their strength at the conservative cost, and of gaining probably some additional influence in that part of the county," &c. Mr. Frewen then proceeded to say that "such a statement was most ungrateful on the part of Mr. Cox (the plaintiff), who would never have been proprietor of that journal but for the help he (Mr. Frewen) had given. [Cries of Shame!] He was in a great strait, and asked him (the speaker) to assist him. He

<sup>1</sup> *Teacy v. McKenna*, I. R. 4 C. L. 374. "But will it be believed that this humane specimen of orthodox Presbyterianism (Teacy) refused to give his hearse, for no other reason than this, that the corpse was to be interred in a Roman Catholic burying ground, saying, at the same time, that he would give it free if deceased had been buried in Tynan, a Protestant burying ground," &c., acc. Conf. *Mawe v. Piggott*, I. R. 4 C. L. 54. — ED.









of the counts in the declaration disclosed any cause of action; or for a new trial, on the ground that the learned judge ought to have directed the jury to find for the defendant on both issues, and also on the ground that the verdict was against the weight of the evidence, and that the damages were excessive.

May 8. *O'Malley, Q. C., Keane, Q. C., and Merewether*, for the plaintiff, showed cause. The charge of ingratitude is clearly libellous: *Hoare v. Silverlock*; and its libellous character is not altered by a statement of the reasons why it is made; rather, the facts stated, being themselves inaccurate, aggravated the libel; a charge much less grave than that of ingratitude is sufficient to give a right of action; and even the false statement as to the plaintiff's pecuniary necessities might so far disparage him as to be actionable. *Fray v. Fray*.

June 3. *Bulwer, Q. C., and Jacques*, for the defendant, supported the rule. Supposing the first count to be good as charging ingratitude simply, yet the second and third are bad; and, the verdict being general, judgment must be arrested, or a *venire de novo* awarded.<sup>1</sup>

As regards the second and third counts, the questions are, whether, in either count, the statement of facts, independently of the conclusion drawn from them by Mr. Frewen, is libellous? and whether those facts support his conclusion? As to the first question, it cannot be said that a statement, in effect, that, when the plaintiff wanted to purchase the paper, Mr. Frewen lent him money which the plaintiff had honorably repaid but that the plaintiff, notwithstanding, declined any longer to support Mr. Frewen, was, to use the language of Parke, B., defining a libel, in *Parmiter v. Coupland*, "calculated to injure the plaintiff's reputation by exposing him to hatred, contempt, or ridicule;" on the contrary, such a statement was calculated rather to raise the character of the plaintiff. As to the second question, the libels complained of do not, as was the case in *Hoare v. Silverlock*, charge the plaintiff with ingratitude simply, but only with conduct which, in Mr. Frewen's opinion, was ungrateful; and, if his opinion upon the facts stated was unfounded, there is no libel; but if his opinion was well founded, then the plea of justification was proved.

The most that can be said in support of the second and third counts is, that Mr. Frewen imputes ingratitude, while at the same time he shows that the imputation is unfounded; for it was not ingratitude in the plaintiff to disregard private friendship in the discharge of his public duty; and there is no suggestion that his opposition to Mr. Frewen was prompted by any sinister motive. The case of *Fray v. Fray* is altogether different from the present; and the proposition in support

<sup>1</sup> See *Ayrey v. Fearnside*, 4 M. & W. 168; *Lewin v. Edwards* 9 M. & W. 720.

of which that case was cited, viz., "that the publication of that which can by any construction, lower the estimation of the plaintiff's character, the plaintiff has a right to have left as a question to the jury," is too broad; for it would seem to imply that in no case can the question of libel or no libel be determined by the court. But that is not so. For instance, to write of an attorney that he is "an honest lawyer" (*Boydell v. Jones*<sup>1</sup>), may or may not be libellous; but a declaration which failed to show by proper averments that the words were used in a sense other than the natural and obvious sense, would be bad both on demurrer and after verdict. Unless the libels alleged in the second and third count consist in the imputation of ingratitude, the plea of justification was proved, because the facts upon which the imputation was founded were stated with substantial accuracy. If the libels relied on are the charges of ingratitude, then, for the reasons already given, those charges were not, under the circumstances, libellous; or, if they were, the truth of them was proved.

KELLY, C. B. The verdict being for general damages not apportioned to the several counts, if any one bad count is joined with the others, the verdict cannot stand. We are, therefore, called on to determine, not whether a libel was in fact published, but whether what the plaintiff has published has been so stated that it was competent to the jury to find a verdict and give damages upon that statement. The allegation in the counts most questioned is, that, when the plaintiff wanted to purchase a newspaper, he had no money to buy it with, and made one or more urgent applications to Mr. Frewen for a loan, which had since been honorably repaid. It is impossible to consider the question raised on this statement fairly without putting one's self in the position of the plaintiff, and seeing whether it would not be painful to his feelings to have such statements made at a public meeting, in the county where he resides and publishes his newspaper, by a gentleman of considerable standing and position in that county. Without reference to the bearing of that statement on the charge of ingratitude, and the question whether it would or would not lead those who heard it to the inference that a person so acting as was described was guilty of ingratitude, to say of a man, prosperous and in independent circumstances, that when he wanted to purchase the property he now owns he had not money to pay for it, and made urgent application for a loan to another person, does in itself convey a reflection on the person thus spoken of, not only likely to be painful to his feelings, but also likely to impair his credit and reputation in the county. A charge pointing to any thing like inability in respect of pecuniary resources would,

<sup>2</sup> 4 M. & W. 446.









to persons reading such a statement in a public newspaper, tend to injure his position in the world. [After referring to the question of damages, which he held not excessive, the learned judge proceeded]: We are further called upon, on the facts actually proved, to determine, not only whether the publication could or could not be libellous, but to say that it was of such a nature that the question ought not to have been left to the jury. But it is only when the judge is satisfied that the publication cannot be a libel, and that, if it is found by the jury to be such, their verdict will be set aside, that he is justified in withdrawing the question from their cognizance. Here, on the contrary, I am of opinion that the learned judge was fully justified in leaving the question to them, and that their finding is according to the evidence.

BRAMWELL, B. I also think this rule must be discharged. The libels complained of charge the plaintiff with ingratitude; for though facts are added, yet the obvious meaning of the statements is to make this accusation. It is clear that, if ingratitude is charged generally, without any reason being given, it is libellous; and the validity of the first count is not questioned. But with respect to the other two, it is said that they disclose no cause of action, because Mr. Frewen shows what it is that he calls ingratitude, and thereby shows that it is not such in fact. But though it is true that he states some reasons which induce him to come to the conclusion that the plaintiff was ungrateful, there still remains the charge of ingratitude, and any one hearing it might well say, "The facts stated, no doubt, existed, but, inasmuch as they do not show any ingratitude, that charge must be made because of something else not mentioned."

But, further, I think that the libels not only contain a charge of ingratitude, but also show its existence, supposing the facts truly stated. For, though it is easy to say that it is the duty of a patriot, if he sees an unfit man aiming at the possession of a public post, to say he is unfit, this is, like gratitude itself, a duty of imperfect obligation, and not such as would necessarily relieve him in its performance from the charge of ingratitude. Suppose that, having applied with great urgency to Mr. Frewen to lend him money, Mr. Frewen had done so, and then, without any further circumstances, the plaintiff had withdrawn his support from Mr. Frewen, and said that he was not a proper person to stand for the county, would it not have been ungrateful? I think it would. But supposing it was his duty to point out Mr. Frewen's unfitness, it might have been done in another way than that adopted, which casts ridicule upon his candidature and charges him with indiscretion. I think that it would have been ungrateful in the plaintiff to write thus of one to whom he was under the obligation I have sup-



posed; the defendant's argument, therefore, fails, even on this ground, for the libel stated in the declaration not only charges ingratitude, but shows that it exists.

Then, it is argued by Mr. Bulwer, that in that case the libel is, at any rate, justified, because the statement it makes is true. But this is not so; and, on the contrary, if the true facts had been stated, they would have shown that there was no ingratitude at all, for it appears that, on the plaintiff telling Mr. Frewen that he would no longer support him, Mr. Frewen required the repayment of the money, and thereupon the money was, in fact, repaid. Now, I think that cancelled the former obligation, and left the plaintiff at liberty to write as he did. If these facts had been stated, the case would have gone a long way to raise the point insisted on by Mr. Bulwer; for then, at the same time with the charge of ingratitude, it would have been shown that there was nothing ungrateful in the plaintiff's conduct; the added circumstances would have qualified the charge of ingratitude, not in the sense of making it justifiable, but in the sense of diminishing the probability of its injurious effect.

Therefore, the defendant's case fails, first, on the ground that a charge of a moral offence is made, and assuming that the circumstances stated in support of it do not warrant the opinion founded on them, it does not cease to be a libel, for it raises a doubt whether there are not some other facts which would justify the charge; and, secondly, because, if no further facts existed than were stated, a case of ingratitude was shown; and, though the facts might be true so far as they were stated, other facts were not stated which existed, and which would have shown that the plaintiff was not open to the charge of ingratitude.

I may say that these observations are directed partly to that portion of the rule which seeks to arrest the judgment, and partly to that portion which asks for a new trial.

CHANNELL, B. I am of the same opinion. A judge would do wrong if, in an action for libel, he told the jury distinctly that the plaintiff had a cause of action, or if he told them distinctly that the plaintiff had not a cause of action. In *Parmiter v. Coupland*, Parke, B., after referring to Mr. Fox's act,<sup>1</sup> by which, as he observes, indictments for libel were put upon the same footing as other criminal charges, says: "It has been the course for a long time for a judge, in cases of libel, as in other cases of a criminal nature, first, to give a legal definition of the offence, and then to leave it to the jury to say whether the facts necessary to constitute that offence are proved to their satisfaction, and that whether

<sup>1</sup> 32 Geo. III. c. 60, § 2.









the libel is the subject of a criminal prosecution or civil action." My brother Pigott has, therefore, given the proper direction to the jury; and certainly when, at a public meeting, words are used which are repeated in a public newspaper, and which charge the defendant with ingratitude, that sufficiently raises a question for the jury, whether they were not made use of under such circumstances, and in such a manner, as to make them libellous. There can be no doubt that the charge is in itself as opprobrious as any that can be made. Therefore, although you couple it with other matters, which tend to explain the charge, it is still a question for the jury whether the language was made use of in such a mode and under such circumstances as to justify a verdict for the plaintiff.

PIGOTT, B. At the trial I exactly followed the rule laid down by Parke, B., in the passage cited by my brother Channell, defining to the jury what in law amounted to a libel, and leaving the question of libel or no libel to them. My brother Bramwell has clearly pointed out that the charge was made not in such a manner as to disprove it, but rather to add to it force and point; and much must always depend upon the attendant circumstances. As to the charge of ingratitude being in itself calculated to bring into contempt and disrepute, no one can deny it who considers in what light it is regarded by poets and moralists, who are the mirrors and exponents of the universal feelings and judgment of mankind. I think, if I committed any error, it was an error rather in favor of the defendant. *Rule discharged.*

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## STEELE v. SOUTHWICK.

SUPREME COURT OF JUDICATURE, NEW YORK, AUGUST, 1812.

[*Reported in 9 Johnson, 214.*]

THIS was an action for a libel. The first count stated that the plaintiff was sworn and examined as a witness in a cause tried at the circuit in Albany, in which this defendant was plaintiff and Harry Crosswell defendant; that the plaintiff is a bookseller and stationer in Albany, and has for a sign a book lettered "Bible;" and that the defendant, maliciously intending, &c., on the 5th December, 1809, printed, &c., in the "Albany Register," a certain false, &c., libel, of and concerning the plaintiff, &c., as follows: "Affidavits. Our army swore terribly in Flanders, said Uncle Toby, and if Toby was here now he might say the same of some modern swearers. The man at the sign of the Bible:

(meaning the plaintiff) is no slouch at swearing to an old story," (meaning, &c.).

The second count stated that the plaintiff was examined as a witness in a cause between the defendant and Croswell, and testified truly, &c.; that the defendant had told him, the plaintiff, that he, the defendant, approved of Fox's maxim, to wit, "that the public was a goose, and that he was a fool who did not pluck a quill when he had an opportunity." Yet the defendant, intending, &c., to cause it to be believed that the plaintiff, in giving the evidence aforesaid, was guilty of perjury, did, on the 9th day of January, 1810, publish, &c., a certain other libel in the "Albany Register," as follows, to wit, "As complete evidence of his candor (meaning his Honor Mr. Justice Spencer, before whom the cause was tried) in the present case, for error there was none, I (the defendant) need only mention that he told the jury emphatically that it was proved by Steele that I had declared to him that I approved of Fox's maxim, that the public was a goose, &c.; that this was a very profligate sentiment, and that if they believed the testimony of Steele, they could not, in estimating damages, conceive any thing due to the feelings of a man capable of entertaining it, for that such feelings could not be injured; but while I acknowledge the correctness of this decision, and most sincerely and heartily concur in it, I am bound to declare, which I now do most solemnly, in the presence of an all-seeing God, my firm conviction that I never made to Steele the declaration above stated. It is utterly impossible, from the barefaced absurdity as well as from the abandoned profligacy manifested by such a declaration, that I ever could have made it; and how that man's (the plaintiff's) imagination has wrought itself into a belief that I made it, is to me truly a subject of wonder, as it is of regret, that I find myself constrained by what is due to my own honor thus publicly and solemnly to deny what he has solemnly and publicly sworn to." By means whereof, &c.

There was a general demurrer to the whole bill, and a joinder in demurrer. The cause was submitted to the court without argument.

*Per Curiam.* The plaintiff in the first count avers that he had been called to testify, as a witness, in behalf of Harry Croswell, in a suit brought by the present defendant against the said Croswell, and that the defendant afterwards, and with a view to injure the character and credit of the plaintiff maliciously published the words stated in that count, in which the plaintiff is represented as swearing "terribly," and as being "no slouch at swearing to an old story." These words import that he swore with levity, and rashly, and inconsiderately, without due regard to the solemnity of the oath, or to the truth and accuracy of what he said.











If the words do not import perjury in the legal sense, they hold the plaintiff up to contempt and ridicule, as being so thoughtless or so immoral as to be regardless of the obligations becoming a witness, and, therefore, to be utterly unworthy of credit. In this view the words are actionable, for a writing published maliciously, with a view to expose a person to contempt and ridicule, is undoubtedly actionable; and what was said to this effect by the judges of the C. B. in *Villers v. Monsley*, is founded in law, justice, and sound policy. The opinion of the court in the case of *Riggs v. Denniston*<sup>1</sup> was to the same effect; and the definition of a libel, as given by Mr. Hamilton in the case of *The People v. Crosswell*,<sup>2</sup> is drawn with the utmost precision. It is a censorious or ridiculing writing, picture, or sign, made with a mischievous and malicious intent towards government, magistrates, or individuals.<sup>3</sup> To allow the press to be the vehicle of malicious ridicule of private character, would soon deprave the moral taste of the community, and render the state of society miserable and barbarous. It is true that such publications are also indictable, as leading to a breach of the peace; but the civil remedy is equally fit and appropriate, and as the jury assess the damages, it is in most cases the more desirable remedy, and one which gives most satisfaction.

The second count does not appear to contain actionable matter.

The defendant confines himself to a denial of the charge and a vindication of himself, and as that denial is not accompanied with any imputation of a crime to the plaintiff, or any thing like malicious or wanton ridicule of him, it does not appear to be any thing more than a lawful vindication. But as the demurrer is to the whole bill, the plaintiff is entitled to judgment.

*Judgment for the plaintiff.*

<sup>1</sup> 3 Johns. Cas. 205.

<sup>3</sup> Johns. Cas. 354.

<sup>2</sup> "A libel is a malicious publication expressed either in printing or writing, or by signs or pictures, tending either to blacken the memory of one dead, or the reputation of one who is alive, and expose him to public hatred, contempt, or ridicule." — Per Parsons, C. J., *Commonwealth v. Clapp*, 4 Mass. 117. — Ed.







said words, &c. And it was found by the jury that he spake these words, to wit: "Men cannot have their cattle going upon the common but John Barber and his children will kill them with Barber's dogs;" and as to the other words he did not speak, &c., and assessed the damages at four pence, and costs at six shillings and eight pence. And upon this verdict judgment was given in C. B., and for this a writ of error was brought, and the error assigned only in this matter, &c., because the words found by the verdict are not sufficient to maintain the action, &c. And for this cause the judgment above was reversed, which note Michaelmas term after.<sup>1</sup>

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### HAULEY v. SIDENHAM.

IN THE QUEEN'S BENCH, MICHAELMAS TERM, 1572.

[Reported in *Dyer*, 317 b, *placitum* 8.]

HAULEY, Esq., brought an action on the case against Sidenham for a slander, for these words, in effect, "M. Halley" (*innuendo* the aforesaid plaintiff) "is infected of the robbery and murder lately committed, and doth smell of the murder" (*innuendo* the aforesaid felony and murder in form aforesaid committed, which was before alleged to be perpetrated). And by the verdict the damages were assessed at £300 and upwards, and sent into B. R. by the justices of *Nisi Prius*; and after long deliberation and argument the plaintiff had judgment, Trin. 15 of Queen Eliz., for this word "infected," &c., contrary to the opinion of CATLYN.

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### HEXT v. YEOMANS.

IN THE QUEEN'S BENCH, EASTER TERM, 1585.

[Reported in 4 *Reports*, 15 b.]

YEOMANS charged Hext, then being a justice of peace, "For my ground in Allerton Hext seeks my life, and if I could find John Silver I do not doubt but within two days to arrest Hext for suspicion of felony;" and it was adjudged that for the first part of the words, "that for my ground in Allerton Hext seeks my life," no action lay, for two reasons: 1. Because he may "seek his life" lawfully upon just cause, and his land may be held of him, and so in *mitiore sensu*. 2. Seeking

<sup>1</sup> Clay v. Barkley, Sneed (Ky.), 67; Porter v. Hughey, 2 Bibb, 232; Brown v. Brown, 14 Me. 317; Sturgenegger v. Taylor, 2 Brev. 480, acc. — Ed.



of his life is too general, and for seeking *tantum* no punishment is inflicted by the law. But for the latter words it was adjudged that the action lay, because for suspicion of felony he shall be imprisoned, and his life drawn in question.<sup>1</sup>

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### DONNE'S CASE.

IN THE QUEEN'S BENCH, MICHAELMAS TERM, 1587.

[Reported in *Croke's Elizabeth*, 62.]

ACTION for these words, "If you had your deserts, you had been hanged before now." *Coke* moved, that the action did not lie, for that he did not show any cause why he should be hanged, and deserts might be in his mind concerning God. *Curia*, contra. For it shall be intended, he had committed an offence, for which the penalty of death was due to him. WRAY, C. J., said, it hath been adjudged, that where one writ the name of another upon a wall, and writ also, that "if this man had his deserts, he should have been hanged on these gallows," and drew a pair of gallows on the wall; it was adjudged that an action did lie for this.<sup>2</sup>

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### ANONYMOUS.

IN THE QUEEN'S BENCH, HILARY TERM, 1589.

[Reported in 3 *Leonard*, 231, *placitum* 313.]

AN action upon the case was brought for these words, *scil.*, "Thou hast forged my hand." It was holden by GAWDY and WRAY, justices, that such words are not actionable, because too general, without showing to what writing; and by WRAY, these words, *scil.*, "Thou art a forger," are not actionable, because it is not to what thing he was a forger.

*Godfery*, between Warner and Cropwell; *scil.*, "She went about to kill me;" an action lieth for them; for if they were true, she should be bounden to the good behavior.

And by GAWDY, for these words, *scil.*, "Thou hast forged a writing;"

<sup>1</sup> Conf. *Tozer v. Mashford*, 6 Ex. 539. — ED.

<sup>2</sup> *Jenkinson v. Mayne*, Cro. Eliz. 384; *Curtis v. Curtis*, 10 Bing. 477; *Francis v. Roose*, 3 M. & W. 191; *Johnson v. Shields*, 1 Dutch. 116; *Weil v. Schmidt*, 28 Wis. 137, acc. Anon., Moore, 243; *Heake v. Moulton*, Yelv. 90; *Fisher v. Atkinson*, 1 Vin. Abr. G, a, 5; *Hancock v. Winter*, 7 Taunt. 205, *contra*. — ED.









they are not actionable, because they are uncertain words; which WRAY, *concessit*, but if the declaration had been more certain, as (*innuendo*) such a deed, then it had been good enough.

FULLER. A case was betwixt Brook and Doughty; *scil.*, "He hath counterfeited my Lord of Leicester's hand unto a letter against the Bishop of London; for the which he was committed to the Marshalsey for it." And it was holden not actionable. And afterwards, in the principal case judgment was *nihil capiat per billam*.<sup>1</sup>

## FERMOR v. DORRINGTON.

IN THE QUEEN'S BENCH, EASTER TERM, 1591.

[Reported in *Croke's Elizabeth*, 222.]

ACTION for words, which were, "I will prove Fermor to be a perjured knave." After verdict, it was alleged in arrest of judgment that the words are not actionable, for he doth not say he was perjured, but that he would prove him perjured; for it may be, that if he doth any act after that, he may be convinced of it. But all the court held that the action lay, and the words cannot have such construction.

Another matter was alleged, that in the *venire facias* and *distringas* one Taverner was named one of the jurors; but in the return of the *distringas*, in lieu of Tavernor one Turnor was returned, and was sworn, and tried the matter; so it is a mistrial, being tried by one that was not returned in the *venire facias*. And COKE cited a precedent in this court between Dousby and Willot, where a juror was returned by the name of Gregory Willot, and in the *distringas* he was named George Willot, and he with others passed upon the inquest; and for this cause the judgment was stayed. And another precedent in the Exchequer, where one Mizael was returned upon the *venire facias*, and upon the *distringas* one Michael, and both these were returned for surnames; and because Michael was sworn, &c., the judgment was stayed. And so it seemed to the court; but they at first doubted if the variance in the surname be a cause to stay judgment; but for variance in the Christian name, they agreed clearly the judgment shall be stayed, but one may have two surnames. But afterwards it was resolved the judgment should be stayed.<sup>2</sup>

<sup>1</sup> Cassabilly v. Brit, 1 Sid. 16; Powell v. Winde, Hob. 305, 327; Dabborne v. Martin, Pop. 177; Godsel v. —, Winch, 90; Anon., Gold. 25; Mills v. Monday, 1 Lev. 112; Perkinson v. Bowman, Cro. Eliz. 853; Thomas v. Axworth, Hob. 2; Venard v. Woton, Cro. Eliz. 166; Aier v. Frost, 1 Roll. R. 431, acc. — ED.

<sup>2</sup> Woodroff v. Vaughan, Cro. Eliz. 429; Ireland v. Goodale, Cro. Eliz. 730; Webb v. Poor, Cro. Eliz. 560; Staverton v. Relse, Yelv. 160; Williams v. Lewis, 3 Lev. 171; Waters v. Jones, 3 Port. 442; Nye v. Otis, 8 Mass. 122, acc.; Bull v. May, 1 Sid.

## STICH v. WISEDOME.

IN THE QUEEN'S BENCH, MICHAELMAS TERM, 1594.

[Reported in *Croke's Elizabeth*, 348.]

ACTION for these words: "Many an honest man has been hanged; and a robbery hath been committed, and I think he was at it; and I think he is a horse-stealer." It was moved after verdict that an action lieth not without an express averment he was so. *Curia*, contra. They are a great slander, if the defendant sheweth not a good cause of his thinking. And it was adjudged for the plaintiff.<sup>1</sup>

## CASTLEMAN v. HOBBS.

IN THE QUEEN'S BENCH, HILARY TERM, 1595.

[Reported in *Croke's Elizabeth*, 428.]

ACTION upon the case for these words: "Thou art a thief, for thou hast stolen half an acre of my corn," *innuendo*, the corn growing upon half an acre of ground reaped and put into shocks by the defendant. Upon this declaration the defendant demurred. And upon the first motion, without much arguing, it was adjudged for the defendant; for the stealing half an acre of corn cannot be said to be felony, for it shall be taken in common parlance and intendment, corn growing upon the land which the plaintiff cut down and carried away; and the *innuendo* helps nothing, unless the words precedent have a vehement presumption of the *innuendo*; and herein no man will intend that it was corn severed when he saith, "half an acre of my corn." Wherefore it was adjudged for the defendant.<sup>2</sup>

220; *Davies' Case*, Hutt. 127; *Bury v. Wright*, Yelv. 126; *Weblin v. Mayer*, Yelv. 153, *contra*. — ED.

<sup>1</sup> *Sydnam v. May*, 3 Bulst. 260; *Peterborough v. Mordant*, 1 Lev. 277; *Anon.*, Sty. 130; *Vinian v. Willett*, 2 Keb. 718; *Peake v. Oldham*, *infra*, p. 655; *Davis v. Noak*, 1 Stark. 377; *Waters v. Jones*, 3 Port. 442; *Giddens v. Mirk*, 4 Ga. 364; *Logan v. Steele*, 1 Bibb. 593; *Miller v. Miller*, 8 Johns. 74; *Beehler v. Steever*, 2 Whart. 313; *Dottarer v. Bushey*, 16 Pa. 204; *Sawyer v. Eifert*, 2 N. & McC. 511, *acc.* — ED.

<sup>2</sup> *Powell v. Hutchins*, Cro. Jac. 204; *Hall v. Hammond*, 1 Sid. 104; *Harbert v. Angell*, Hutt. 113; *Anon.*, 2 Brownl. 84; *Bynion v. Trotter*, Sty. 231; *Cock v. Weatherby*, 13 Miss. 333; *Ogden v. Riley*, 2 Green, 186; *Idol v. Jones*, 2 Dev. 162, *acc.* See also *Williams v. Gardiner*, 1 M. & W. 245; *Day v. Robinson*, 1 A. & E. 554; *Hoskins v. Tarrence*, 5 Blackf. 417; *McCarty v. Barrett*, 12 Minn. 494; *Blanchard v. Fisk*, 2 N. H. 398; *Wall v. Hoskins*, 5 Ired. 177; *Alfele v. Wright*, 17 Ohio St. 238; *Findlay v. Bear*, 8 Serg. & R. 571; *Dickey v. Andros*, 32 Vt. 55. — ED.











## SNAG v. GEE.

IN THE COMMON PLEAS, HILARY TERM, 1597

[Reported in 4 Reports, 16 a.]

THE plaintiff showed in his declaration that the defendant had a wife yet living, and that the defendant said of the plaintiff, "Thou hast killed my wife, thou art a traitor." And as to these words, "thou hast killed my wife," the defendant demurred in law; and it was adjudged that no action lay; and the difference taken when the wife was living (as in this case it appeared she was), and when she was dead; for when she is alive no action lies, although the defendant says that the plaintiff has murdered her; for then it appears that no murder of her can be committed, nor the defendant in any jeopardy, and so the words vain, and no scandal or damage to the plaintiff.<sup>1</sup>

## PASSIE v. MONDFORD.

IN THE EXCHEQUER CHAMBER, TRINITY TERM, 1599.

[Reported in Croke's Elizabeth, 747.]

ERROR of a judgment in an action for these words: "Mrs. Margaret Passie" (*innuendo* the plaintiff) "sent a letter to my master, and therein willed him to poison his wife." The error assigned was that the words were not actionable, for there is not any act done, and so not like to the case where one said that "J. S. lay in wait to commit such murder." But all the justices and barons, except **KINGSMILL**, resolved that the action lay; for it is a great slander to will one to do such an act, which is so odious. Wherefore it was adjudged accordingly; and the first judgment was affirmed.<sup>2</sup>

<sup>1</sup> Jacob v. Mills, Cro. Jac. 343; Boldroe v. Porter, Yelv. 22; Snyder v. Degant, 4 Ind. 578, acc. Conf. Ayres v. Covill, 18 Barb. 260.

Billing v. Knight, 2 Bulst. 42; Phillips v. Kingston, 1 Ventr. 117; Grene v. Warner, 3 Keb. 624; Chandler v. Holloway, 4 Porter, 17; Stallings v. Newman, 26 Ala. 300; Ausman v. Veal, 10 Ind. 357; Tenney v. Clement, 10 N. H. 52; Case v. Buckley, 15 Wend. 327; Sugart v. Carter, 1 Dev. & Bat. 8; Chambers v. White, 2 Jones (N. Car.), 383; Eckhart v. Wilson, 10 Serg. & R. 44, *contra*. See also Heming v. Power, 10 M. & W. 569, per Parke, B. Conf. Harmon v. Carrington, 8 Wend. 488; Filber v. Dauterman, 28 Wis. 518. — Ed.

<sup>2</sup> Preston v. Pinder, Cro. Eliz. 308; Tibbott v. Haynes, Cro. Eliz. 191; Cockaine v. Witnam, Cro. Eliz. 49; Lewknor v. Cruchley, Cro. Car. 140; Scot v. Hilliar, Lane, 98; Deane v. Eaton, 1 Bulst. 201; Mills v. Wimp, 10 B. Monr. 417; Demarest v. Haring, 6 Cow. 76, acc.; Murrey v. —, 2 Bulst. 206; Bray v. Andrews, Dall. 66, pl. 29, *contra*. Conf. Eaton v. Allen, 4 Rep. 16 b; Mayne v. Digle, Freem. 46; Anon., Godb. 202; Wallace v. Grant, Sneed (Ky.), 68. — Ed.

## BALL v. BRIDGES.

IN THE EXCHEQUER CHAMBER, HILARY TERM, 1600.

[Reported in *Croke's Elizabeth*, 746.]

ERROR of a judgment in an action upon the case for these words of Bridges: "He is a maintainer of thieves, and keepeth none but thieves in his house, and I will prove it." The error assigned was that the words were not actionable; for he doth not say and aver that he knew them to be thieves whom he maintained; and one may have thieves in his house, and maintain them, and not know them to be thieves, and then it is not any offence. And so was the opinion of all the justices and barons; and the judgment was reversed.<sup>1</sup>

## GRIFFITH'S CASE.

IN THE QUEEN'S BENCH, MICHAELMAS TERM, 1600.

[Reported in *Croke's Elizabeth*, 780.]

ACTION for these words: "Thou hast stolen my mare, or consentedst to the stealing of her." The defendant pleaded not guilty, and found against him; and after verdict it was moved that an action lay not for these words, for they are in the disjunctive; and as to the last word, it lies not, for he may be said to be consenting because he did not contradict it. And of that opinion were FENNER and CLENCH, being only in court, and awarded, *quod querens nil capiat per billam*.<sup>2</sup>

## BROUGH v. DENNISON.

IN THE QUEEN'S BENCH, HILARY TERM, 1601.

[Reported in *Goldsborough*, 143, *placitum* 58.]

BROUGH against Dennison brought an action for words, viz., "Thou hast stolen by the highway side." POPHAM. The words are not actionable, for it may be taken that he stole upon a man suddenly, as the common proverb is, that he stole upon me, *innuendo*, that he came to me unawares; and when a man creepeth up a hedge, the common

<sup>1</sup> Hall v. Hennesley, Cro. Eliz. 486, acc. — ED.

<sup>2</sup> Stirley v. Hill, Cro. Car. 283; Falkner v. Cooper, Cart. 55, acc. But see Harrison v. Thornborough, 10 Mod. 196. — ED.











phrase is, he stole up the hedge. FENNER. When the words may have a good construction, you shall never construe them to an evil sense. And it may be intended he stole a stick under a hedge, and these words are not so slanderous that they are actionable.

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### TALBOT v. CASE.

IN THE QUEEN'S BENCH, EASTER TERM, 1601.

[Reported in *Croke's Elizabeth*, 823.]

ACTION for these words: "Thou hast killed my wife." After verdict for the plaintiff, upon not guilty pleaded, it was moved that an action lay not for these words, because it is not said with what intent he killed her, violently or otherwise, and he doth not aver that his wife is dead. But, notwithstanding, it was adjudged for the plaintiff; for it is to be intended, if the contrary be not shown by the defendant, that his wife is dead; and it shall be taken in the worst sense, viz., violently.<sup>1</sup>

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### DAWSON.

IN THE QUEEN'S BENCH, TRINITY TERM, 1602.

[Reported in *Yelverton*, 5.]

AN action on the case for these words: "Thou art an arrant knave, for thou hast bought stolen swine, and a stolen cow, knowing them to be stolen." And adjudged against the plaintiff, for the receipt or sale of goods stolen is not felony, nor makes any accessory unless it is joined with a receipt or abetment of the felon himself. And in some case it is lawful to receive stolen goods, as if the lord of a manor or his bailiff who has *bona waviata*, meets with a suspicious person who has stolen goods, and stops the goods, and the party confesses them to be stolen and flees, in that case it is a receipt of goods stolen, knowing them to be stolen; and yet it is not any slander if any one should say to him, you have taken stolen goods, knowing them to be stolen. By GAWDY, FENNER, and YELVERTON; POPHAM *absente*.<sup>2</sup>

<sup>1</sup> *Web v. Poor*, Cro. Eliz. 569; *Davis v. Ockham*, Sty. 245; *Gardiner v. Spurdant*, Cro. Jac. 438; *Bernard v. Levit*, Sty. 227; *Banfield v. Lincoln*, Freem. 278; *Wilner v. Hold*, Cro. Car. 489; *Reynor v. Hallet*, Poph. 187; *Toose v. St.*, Cro. Jac. 306; *Cooper v. Smith*, Cro. Jac. 423; *Godfry v. More*, Cro. Eliz. 317; *Button v. Heyward*, 8 Mod. 24; *Johnson v. Robertson*, 8 Port. 486; *Dudley v. Robinson*, 2 Ired. 141, acc.; *Carle's Case*, Godb. 181, *contra*. — ED.

<sup>2</sup> *Steventon v. Higgins*, 2 Keb. 338; *Cresswell v. Ventryes*, Sty. 91, acc. Conf. *Hollis v. Briscoe*, Yelv. 64.

*Brigg's Case*, Godb. 157; *Gamble v. Jenney*, 2 Keb. 494; *Alfred v. Farlow*, 8 Q. B.

## CORE v. MORTON.

IN THE QUEEN'S BENCH, MICHAELMAS TERM, 1602.

[Reported in *Yelverton*, 28.]

THE plaintiff declared, that whereas he was a good and loyal subject, and of a good reputation, &c., the defendant spoke these words of him: "Thou art a false and forsworn knave, and that I will prove, for thou forswore thyself against Peter Rumball in the hundred court." And upon *non culp.* pleaded, it was found for the plaintiff, but adjudged *quod nil capiat per billam*; for the words as they are laid will not bear an action; for forsworn, by itself, does not import slander; otherwise of the word "perjured." And forasmuch as the plaintiff in this action did not show that there was any action depending in the hundred court between Peter Rumball and some other, in which the plaintiff was produced for a witness, which might have induced the word "forsworn" to have been equivalent to the word "perjured;" for this reason it was adjudged against the plaintiff; for perhaps in discourse between Rumball and the plaintiff in the hundred court, voluntarily between themselves, the plaintiff might swear something falsely; and the defendant might thereupon say that he was forsworn, which does not sound in any slander.<sup>1</sup>

## BARHAM v. NETHERSAL.

IN THE KING'S BENCH, MICHAELMAS TERM, 1602.

[Reported in 4 *Reports*, 20 a.]

BARHAM brought an action on the case against Nethersal, and the words were, "Master Barham did burn my barn" (*innuendo* a barn with corn) "with his own hands, and none but he;" and after verdict, it was moved in arrest of judgment that the words were not actionable for it is not felony to burn a barn if it is not parcel of a mansion-house, nor full of corn; and in such case *agitur civiliter* and not *criminaliter*, *et verba accipienda sunt in mitiore sensu*; and the *innuendo* will not serve when the words themselves are not slanderous; which well agrees with divers of the resolutions before.<sup>2</sup>

854, *contra*. Conf. *Pridam v. Tucker*, Noy, 133; *Anon.*, Sty. 892; *Tabbe v. Matthews*, 1 Bulst. 109; *King v. Lorking*, 1 Bulst. 147. — ED.

<sup>1</sup> *Page v. Keble*, Cro. Jac. 436; *Smith's Case*, Mar. 7; *Hartwell v. Cole*, Freeman. 55; *Knight v. Sharp*, 24 Ark. 602; *Cummins v. Butler*, 3 Blackf. 190, acc. — ED.

<sup>2</sup> *Lovet v. Hawthorn*, Cro. Eliz. 834; *Bundy v. Hart*, 46 Mo. 460; *Redway v. Gray*, 31 Vt. 292, acc.

See, for words imputing the crime of arson, *Waters v. Jones*, 3 Port. 442; *Tuttle*









## BITTRIDGE'S CASE.

IN THE QUEEN'S BENCH, MICHAELMAS TERM, 1602

[Reported in 4 Reports, 18 b.]

BITTRIDGE brought an action upon the case for these words: "Mr. Bittridge is a perjured old knave, and that is to be proved by a stake parting the land of H. Martin and Mr. Wright." The defendant pleaded not guilty, and was found guilty; and now, in arrest of judgment, it was moved that these words are not actionable, — 1. Because this word, "a perjured old knave," the noun is knave, and perjured is spoken adjectively; as if a man says one is a seditious or thievish knave, these words are not actionable, because the words do not import that he hath made sedition or felony, but are adjective, which imply an inclination to it. 2. That the court ought to judge upon all the words together, and collect the defendant's intention upon all his words, and not to take his words by parcels. And it was said that the last words extenuate the genuine and proper sense of the first words; for perjury shall be intended in some court upon judicial proceeding; but when he adds, "and that is to be proved by a stake parting," &c., that explains for any thing that appears to the court that this perjury was not in any court, but an unadvised oath, extrajudicial, about the placing of a stake for a partition. As to the first, it was resolved by POPHAM, C. J., GAWDY, FENNER, and YELVERTON, JJ., that for these words, "thou art a perjured knave," without any more, an action upon the case lies,<sup>1</sup> for sometimes adjective words will maintain an action, and sometimes not. They are actionable, 1. When the adjective presumes an act committed;

*v. Bishop*, 30 Conn. 80; *Logan v. Steele*, 1 Bibb, 593; *Wallace v. Young*, 5 Monr. 155; *House v. House*, 5 Harr. & J. 125; *Case v. Buckley*, 15 Wend. 327; *Hurd v. Moore*, 2 Oreg. 85; *Gage v. Shelton*, 3 Rich. 242; *Nichols v. Packard*, 16 Vt. 83; *Weil v. Schmidt*, 28 Wis. 137. Conf. *Sweetapple v. Jesse*, 5 B. & Ad. 27; *Robinson v. Drummond*, 24 Ala. 174; *Jones v. Hungerford*, 4 G. & J. 402; *Bloss v. Toby*, 2 Pick. 320; *Tebbetts v. Goding*, 9 Gray, 254; *Brettun v. Anthony*, 103 Mass. 37, where the words proved were held not to impute the crime of arson. — ED.

<sup>1</sup> *Corbet v. Hill*, Cro. Eliz. 609; *Mestyne v. Farneden*, 3 Bulst. 283; *Hogg v. Vaughan*, Sty. 6; *White's Case*, Sty. 17; *Bridges v. Playdell*, 1 Brownl. 2; *Raynor v. Griviston*, Noy, 61; *Adams v. Flemming*, Hob. 283; *Carter's Case*, Ow. 13; *Woodlife v. Vaughan*, Moore, 365; *Orton v. Fuller*, 1 Lev. 65; *Lea v. Robertson*, 1 Stew. 138; *Commons v. Walters*, 1 Port. 377; *Chapman v. Gillet*, 2 Conn. 40; *Eccles v. Shannon*, 4 Harringt. 193; *Newbit v. Statuck*, 25 Me. 315; *Small v. Clewley*, 60 Me. 262; *Haight v. Morris*, 2 Halst. 289; *Green v. Long*, 2 Caines, 91; *Cook v. Bostwick*, 12 Wend. 48; *Crawford v. Wilson*, 4 Barb. 504; *Cummin v. Smith*, 2 Serg. & R. 440; *Haas v. Stamford*, 4 Sneed (Tenn.), 520; *Bell v. Farnsworth*, 11 Humph. 608, acc.; *Stile v. Heape*, Yelv. 72; *Weaver v. Cariden*, 4 Rep. 16 *a*, *contra*. See *Tugh v. McCarty*, 40 Ga. 444; *Harris v. Dixon*, Cro. Jac. 158; *Beers v. Strong*, Kirby, 12. — ED.



2. When they scandalize one in his office, or function, or trade, by which he gets his living; as if a man says that one is "a perjured knave," there must be an act done, or otherwise he cannot be perjured, as was resolved before. So if one says of an officer, or a judge, that he is a corrupt officer or judge, an action lies for both causes, 1. Because it implies an act done; 2. It is slanderous to him in respect of his office. Pasch. 24 Eliz., in B. R., Philips, Bachelor of Divinity, and parson of D., brought an action upon the case against Robert Badby, Esq., because the same defendant spoke these words in London: "Thou hast made a seditious sermon, and moved the people to sedition this day." The defendant justified at St. Edmund's-Bury, in Suffolk, that he spake the said words at Bury, upon which the plaintiff demurred; and in that case two points were resolved: 1. Notwithstanding that the first part of the words were uttered adjectively, and the latter words were but moving to sedition, and it did not appear that any followed, yet, because they scandalized the plaintiff in his function, it was resolved that the words were actionable; 2. That the defendant ought to have justified the words in London, and not at Bury, for the words in the declaration were not answered; wherefore judgment was given for the plaintiff. So if one says of a merchant that he is a "bankruptly knave, or bankrupt knave," although there bankrupt be spoken adjectively, yet an action lies, as it was adjudged in Mitton's Case, in C. B. Mich. 43 & 44 Eliz. Or if one says of a merchant "that he will be bankrupt in two days," which implies but inclination, yet an action lies (6 E. 6; Dyer, 72); for that defames him in his trade by which he gets his living; but when the words do not imply an act done, but an inclination to an act which doth not scandalize the party in the duty of any office or function, nor in his trade of living, there an action upon the case doth not lie; as to say that he is a "seditious or thievish knave," these do not import any act to be done, but an intent or inclination to it, which is not punishable by the common law. As to the second, it was resolved, in the case of Bittridge, that upon all the words taken together no action lay; for the latter words extenuate the first, and explain his intent, that he did not intend any judicial perjury. Also, it is impossible that a stake can prove him perjured, and, therefore, upon consideration of all the words, for the impossibility and indefensibility of them, they are not actionable, as it has been adjudged that where one says to another, "Thou art a thief, for thou hast stolen my apples out of my orchard," or, "for thou hast robbed my hop-ground," which latter words prove it no felony, and so qualify the proper sense of this word "thief," which of itself, although it is generally spoken, will bear an action. And so it was adjudged *inter Dobbins & Franklin*, Mich. 43 & 44 Eliz. in C. B. And it was agreed









that it is all one to say, "thou art a thief, for thou hast stolen my apples out of my orchard," and to say, "thou art a thief, and that will be proved by stealing my apples in my orchard." So, in the case at bar, "thou art a perjured old knave, and that will be proved by a stake parting," &c. For the office of judges is, upon consideration of all the words, to collect the true scope and intention of him who speaks them; and if in this case the plaintiff had declared only upon the first words, *scil.*, "thou art a perjured knave," the defendant might have showed all the words, and the coherence of them, as appears before in the Lord Cromwell's Case. But it was said that, if the plaintiff's counsel had disclosed the truth of the case in the declaration, the said words would have well maintained the action; for the truth of the case was that, in an action between Martin and Wright, the state of the controversy was, whether the said stake stood upon the land of the one or of the other, or indifferently, as a boundary betwixt them. And in that action the plaintiff was sworn as a witness, and, by the pretence of the defendant, had in his deposition perjured himself; but this special matter was not showed, and therefore it was adjudged *quod querens nihil capiat per billam*.<sup>1</sup>

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MINORS v. LEEFORD.

IN THE KING'S BENCH, HILARY TERM, 1606.

[Reported in *Croke's James*, 114.]

ACTION for these words: "Thou art a thief, and hath stolen Mr. St. George's tree." After verdict for the plaintiff, it was moved in arrest of judgment that the words are not actionable; for to say, "thou hast stolen a tree," an action lies not; for it is not any felony, for it is *arbor dum crescit*. The court was of that opinion. And then when he saith, "Thou art a thief, and thou hast stolen a tree," that shows the reason of his speech which is not any slander; so no action lies, &c.

TANFIELD. In Stanley's Case, in the Common Pleas, this difference was agreed: "Thou art a thief, for thou hast stolen such a thing," the stealing whereof appears to be no felony, an action lies not; for the subsequent words show the reason of his calling him thief: but when he saith, "Thou art a thief, and thou hast stolen such a thing," which in itself is not felony; yet the action lies for calling him thief generally; and the addition, "and thou hast stolen," is another distinct sentence by itself, and is not the reason of the former speech, nor

<sup>1</sup> Lewis v. Acton, Yelv. 34; Waggoner v. Richmond, Wright (Ohio), 173; Willis v. Patterson, Tappan, 275, acc. — ED.

any diminution thereof, but an addition thereto, and so he conceived here.

FENNER and WILLIAMS were of that opinion, but YELVERTON doubted thereof; and (*absente* POPHAM) it was adjudged for the plaintiff.<sup>1</sup>

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### HOLT v. ASTGRIGG.

IN THE KING'S BENCH, MICHAELMAS TERM, 1607.

[*Reported in Croke's James, 184.*]

ACTION upon the case for words: "Sir Thomas Holt struck his cook on the head with a cleaver, and cleaved his head; the one part lay on the one shoulder, and another part on the other." The defendant pleaded not guilty, and it was found against him.

It was now moved in arrest of judgment that these words were not actionable; for it is not averred that the cook was killed, but argumentative.

The court was of that opinion (FLEMING, C. J., and WILLIAMS, *absentibus*); for slander ought to be direct, against which there may not be any intendment; but here, notwithstanding such wounding, the party may yet be living; and it is then but trespass. Wherefore it was adjudged for the defendant.

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### SKELTON v. EARTH.

IN THE UPPER BENCH, EASTER TERM, 1658.

[*Reported in 2 Siderfin, 71.*]

ACTION on the case for these words: "Thy husband was the death of Jo. Parret, and had it not been for thee and thy husband, he had been alive unto this day." It was now moved in arrest of judgment at the bar.

GLYN, C. J., said that he might be the occasion, yet not the cause, as by sending the said J. P. on a journey, by reason of which, &c.; or by ousting him from his estate, so that he occasionally languished; or by means more trivial than these. See Burton's Melancholy.<sup>2</sup>

<sup>1</sup> *Benson v. Morley*, Cro. Jac. 153, acc.; *Clarke v. Gilbert*, Hob. 331; *Goddard v. Gilbert*, Winch, 3, 10; *Coote v. Gilbert*, Hob. 77; *Ogden v. Riley*, 2 Green, 186, *contra.* — ED.

<sup>2</sup> *Miller v. Buckdon*, 2 Bulst. 10, acc. — ED.











## WARD v. POOL.

IN THE COMMON PLEAS, EASTER TERM, 1610 OR 1611.

[Reported in Godbolt, 167.]

AN action upon the case was brought for speaking these words: "Thou mayest well be richer than I am, for thou hast coined thirty shillings in a day; thou art a coiner of money," &c. I will justify it. It was moved in arrest of judgment that the words were not actionable, because he might have a good authority to coin money; for men who work in the mint are said to coin money, and are called coiners of money; and so it was adjudged, *quod querens nihil capiat per billam*.<sup>1</sup>

## HOLLAND v. STONER.

IN THE EXCHEQUER CHAMBER, MICHAELMAS TERM, 1612.

[Reported in Croke's James, 315.]

ERROR of a judgment in the King's Bench in an action for these words: "Thou art a lewd fellow; thou didst set upon me by the highway, and take my purse from me; and I will be sworn to it."

The error assigned was, because an action lay not for these words; for he doth not charge him with felony, nor with robbing of him, or with any felonious taking away his purse; and it may be he took it away in jest, or for some other cause, and it is not any direct slander. And all the judges and barons were of that opinion; wherefore the judgment was reversed.<sup>2</sup>

## BAYLY v. MAYNARD.

IN THE KING'S BENCH, MICHAELMAS TERM, 1614.

[Reported in 2 Bulstrode, 134.]

IN an action upon the case for words, upon *non culp.* pleaded, a verdict was found for the plaintiff. It was moved in arrest of judgment.

<sup>1</sup> Mill's Case, Godb. 375, acc. But see Speed v. Perry, Salk. 697 (overruling Ward v. Pool); and Walfin v. Beaver, 3 Lev. 166; Brittain v. Allen, 3 Dev. 167; s. c. 2 Dev. 120; Naden v. Micoche, 3 Lev. 166; Thirman v. Matthews, 1 Stew. 384; Howard v. Stephenson, 2 Mill's C. R. 408. Conf. Church v. Bridgman, 6 Mo. 190; Pike v. Van Wormer, 5 How. Pr. 171. — Ed.

<sup>2</sup> Latham v. Humphrey, Cro. Eliz. 890, acc.; Lewis v. Cawardly, Cro. Jac. 312, *contra*. See Lawrence v. Woodward, Cro. Car. 277; Gold v. Robbins, Yelv. 145. — Ed.

ment that the words were not actionable. The words were these, spoken by the defendant of the plaintiff: "Thou art a roguish knave, and a thief." *Cur.* Notwithstanding this be spoken in the adjective sense, yet the word (thief) here is a distinct word by itself, and scandalous, and so these words, as they are spoken, are scandalous and actionable; and so by the rule of the court judgment was given, and so entered for the plaintiff.<sup>1</sup>

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### CROFORD v. BLISSE.

IN THE KING'S BENCH, MICHAELMAS TERM, 1613.

[Reported in 2 *Bulstrode*, 150.]

IN an action upon the case for words, by the defendant spoken of the plaintiff to another, who first said unto him, "If it had not been for such a man's oath" (meaning the plaintiff) "at such a court baron, I had not been cast;" upon this, the defendant said unto him, "I marvel that you, being a wise man, will marry your daughter to such a forsworn man" (meaning the plaintiff). For these words an action brought, and upon *non culp.* pleaded, a verdict was found for the plaintiff. *Thomas Crew* moved the court in arrest of judgment, that these words were not actionable; the rule and difference in law in such cases is this: if one calls another a perjured man, these words are actionable, and it shall be intended that the same was in a court of justice, and to have a necessary reference unto this; but for these words, "forsworn fellow," no action lies; but if these had reference to a judicial court, they are then held to be actionable, and this is the general difference in law touching these and the like words. But it doth not appear by any thing that is showed that there was any cause to keep a court baron, and if no court, then it is no other but to call one generally a forsworn fellow. Here it is said, *in curia baronis socæ domini regis, apud Sommercotes*, and doth not say, *apud socam prædictam*. COKE. C. J. This is not good; for swearing in a court amounts unto perjury; but there, if he forswear himself in a matter not material, he is not to be punished for perjury, because in a matter impertinent to the issue;

<sup>1</sup> *Painter v. Warn*, 2 *Bulst.* 141; *Norman's Case*, *Gold.* 56; *Gold v. Robins*, *Yelv.* 145; *Brown v. Worsley*, *Cro. Eliz.* 282; *Steeneman v. Richardson*, 2 *Bulst.* 145; *Parret v. Parret*, 3 *Bulst.* 303; *Anon.*, *Hutt.* 110; *Gardner v. Atwater*, *Say.* 265; *Charnel's Case*, *Cro. Eliz.* 279; *Stamp v. White*, *Cro. Jac.* 600; *Waineright v. Whitley*, *Sty.* 115; *Yearworth v. Pierce*, *Aleyn*, 31; *Wetherly v. Wills*, *Winch*, 6; *Fleming v. Jales*, 2 *Brownl.* 280, *acc.*; *Brugis v. Warenford*, *Dy.* 75, *pl.* 21; *Wheeler v. Appleton*, *Godb.* 389, *contra*. — ED.











and so no party is by this grieved, and therefore he which will have benefit by an action for slanderous words for perjury (saying that he was perjured), he ought certainly to show this to be in a court, and in a matter pertinent to the issue; also, if the words were, that he was forsworn, *dando evidentiam ad exitum*, this is good; and so if in a judicial court forsworn, this doth amount unto perjury; but if no court, then the same is *coram non judice*; and so, because it was not here certainly laid to be within the Soake, the court was all clear of opinion that the same was not good. COKE, C. J. *Non refert quid notum sit judicii, si totum non sit in forma judicii*, as Bracton observeth; and so the whole court was clear of opinion that the declaration here was not good, and therefore the rule of the court was *quod querens nil capiat per billam*.<sup>1</sup>

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### STEWART v. BISHOP.

IN THE KING'S BENCH, TRINITY TERM, 1616.

[Reported in *Hobart*, 177.]

JAMES STEWART brought an action of the case against Bishop, for saying of him, "James Stewart, *innuendo*, &c., is in Warwick gaol for stealing of a mare and other beasts;" and after a verdict for the plaintiff upon divers motions in arrest of judgment, the whole court gave opinion *seriatim*, that the words would not bear action; for they do not affirm directly that he did steal the beasts, as if he had said that he stole them and was in gaol for it; but they do only make report of his imprisonment, and the supposed reason of it; and it may very well be that the warrant or *mittimus* was for stealing expressly, and it is the common form of making of the calendars of the prisoners for the justices of assize, or the like.

<sup>1</sup> *Skinner v. Trobe*, Cro. Jac. 190; *Hall v. Montgomery*, 8 Ala. 510; *Mahan v. Berry*, 5 Mo. 21; *Ward v. Clark*, 2 Johns. 10; *Muchler v. Mulhollen*, Hill & D. 263; *Bullock v. Koon*, 9 Cow. 30; *Bullock v. Koon*, 4 Wend. 531; *Boling v. Luther*, 2 Tayl. 202; *Sluder v. Wilson*, 10 Ired. 92; *Power v. Miller*, 2 McCord, 220; *Dalrymple v. Lofton*, 2 McMull. 112; *Dalrymple v. Lofton*, 2 Speer, 588; *Sanderson v. Hubbard*, 14 Vt. 462, acc. See also *Shaw v. Thompson*, Cro. Eliz. 609; *Pierce v. Howe*, 1 Leon. 131; *Commons v. Walters*, 1 Port. 377; *Clark v. Ellis*, 2 Blackf. 8; *Weston v. Lumley*, 23 Ind. 486; *Hamilton v. Dent*, Hayw. (N. Car.) 117; *Morgan v. Livingston*, 2 Rich. 573; *Gibbons v. Tarter*, 5 Sneed (Tenn.), 644. Conf. *Dalton v. Higgins*, 34 Ga. 433; *Harvey v. Boies*, 1 Pen. & W. 12, acc. — ED.

## TURNER v. CHAMPION.

IN THE KING'S BENCH, MICHAELMAS TERM, 1618.

[Reported in *Croke's James*, 442.]

ACTION for these words: "Thou hast stolen my corn and carried it to market." It was moved in arrest of judgment that the action lay not, for it might be corn growing, and then it is no felony; and words shall be taken *in mitiori sensu*.

*Sed non allocatur*; for it shall be intended, according to the common sense, corn in the barn, not in sheaves, whereof a quantity cannot be taken and carried to market. Wherefore it was adjudged for the plaintiff.<sup>1</sup>

## SERLE v. MANDER.

IN THE KING'S BENCH, HILARY TERM, 1619.

[Reported in *Popham*, 150.]

SERLE brought an action upon the case against Mander for these words, to wit, "I arrest you upon felony;" and after verdict for the plaintiff it was moved in arrest of judgment by *Richardson* that the words were not actionable, for he doth not say that the plaintiff had committed felony; but it was resolved by the court, and so adjudged, that the action lieth.<sup>2</sup>

<sup>1</sup> *Smith v. Ward*, Cro. Jac. 674; *Gibbs v. Dunn*, Sty. 135; *Aris v. Higgins*, Hutt. 65; *Male v. Ket*, 1 Brownl. 2; *Dr. Sybthorp's Case*, Cro. Car. 417; *Kellan v. Manesby*, Cro. Jac. 39; *Petty v. Waight*, 1 Bulst. 173; *Anon.*, Cro. Eliz. 363; *Barton v. Holmes*, 16 Iowa, 252; *Hume v. Arrasmith*, 1 Bibb, 165; *Wheatley v. Wallis*, 3 Har. & J. 1; *Johnson v. Dicken*, 25 Mo. 580; *Maybee v. Fisk*, 42 Barb. 326, acc. Conf. *Welsh v. Eakle*, 7 J. J. Marsh. 424; *Stitzell v. Reynolds*, 67 Pa. 54. — Ed.

<sup>2</sup> *Smith v. Hogshead*, W. Jones, 302; *Tempest v. Chambers*, 1 Stark. 67; *Blizard v. Kelly*, 2 B. & C. 283; *Hill v. Miles*, 9 N. H. 9, acc; *King v. Merrick*, Poph. 210; *Poland v. Mason*, Hob. 305, 326, *contra*. Conf. *Harrison v. King*, 7 Taunt. 431. — Ed.









FOSTER v. BROWNING.

IN THE COMMON PLEAS, HILARY TERM, 1623.

[*Reported in Croke's James*, 688.]

ACTION for these words: "Thou art as arrant a thief as any is in England; for thou hath broken up J. S.'s chest, and taken away forty pounds."

After verdict it was moved in arrest of judgment, because he doth not aver that there was any thief in England, and the last words do not import any felony; for he sheweth not that he stole any money, or robbed him of any money.

And therefore all the justices held that the action lay not; for it is not to be maintained by intendment, but by express words; for the first words without an averment will not maintain an action. And the words do not prove any felony to be committed; for the money may be taken away, and the chest broken open upon pretence of title, and in the mid-day, and presence of divers; and then it is not any felony.

HOBART, C. J., put the case: if one saith, "Thou art a thief, for thou hast taken away my corn," action lies not; for the taking may be lawful. But if he had said, "For thou hast stolen my corn," action lies; for it shall be intended corn threshed, and not in the sheaves. Wherefore it was adjudged for the defendant.<sup>1</sup>

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WILLIAMS v. BICKERTON.

IN THE COMMON PLEAS, MICHAELMAS TERM, 1627.

[*Reported in Hetley*, 63.]

WILLIAMS brought an action upon the case against Bickerton for saying, "He hath forsworn himself, and I'll teach him the price of an oath, for I will have his ears cropt." And it seemed that it lay; for although it was not said at the beginning where it was that he forswore himself, yet by the circumstance it shows that he was in such a place, for which it was punishable. And M. 29, 30 Eliz., Dantsley's Case. "Thou art a pillory knave; remember that thou hast deserved the pillory;" and the action maintainable. And the plaintiff paid the box for his judgment.<sup>2</sup>

<sup>1</sup> Wittam's Case, Noy, 116; Sparham v. Pye, Cro. Jac. 530; Thompson v. Knott, Yelv. 144; Upton v. Pinfold, Com. 267; Dacey v. Clinch, 1 Sid. 53; Ratcliffe v. Shubrey, Cro. Eliz. 224; Heake v. Moulton, Yelv. 90; Bush v. Smith, T. Jones, 157, acc.—Ed.

<sup>2</sup> Ireland v. Goodale, Cro. Eliz. 730; Crone v. Angell, 14 Mich. 340; Pelton v.



## CEELY v. HOSKINS.

IN THE KING'S BENCH, HILARY TERM, 1637.

[Reported in *Croke's Charles*, 509.]

ERROR of a judgment in the Common Pleas in an action for these words: "Thou art forsworn in a court of record, and that I will prove." After verdict, upon not guilty, and found for the plaintiff, the defendant there moving that these words were not actionable, and judgment being there given for the defendant, a writ of error was brought and assigned in point of judgment.

ROLLE, for the plaintiff in error, moved to have the judgment reversed, because the words are very slanderous, and as much as if he had said, "He was a perjured person."

But *Maynard*, for the defendant in error, said that it had been much debated in the Common Pleas, and the court there agreed that the action would not lie; and he conceived the reason to be because he did not say in what court of record he was forsworn, nor that he was forsworn in giving any evidence to any jury; and it may be that he intended only that he was forsworn, not judicially, but in ordinary discourse in some court of record.

But JONES, BERKLEY, and myself held clearly that the action well lay; and such foreign intendment as *Maynard* pretended shall not be conceived; and it shall be taken that he spake these words maliciously, accusing him of perjury, and for a false oath taken judicially upon judicial proceedings in a court of record, and shall be understood according to the common speech and usual intendment: as to say such a one is "a murderer" (not speaking whom he murdered, or when), an action lies; and it shall not be intended that he was a murderer of hares, unless such foreign intendment be discovered or shown in pleading. Wherefore they all held that the judgment is erroneous; but because BRAMPSTON was absent, they would advise. And afterwards the judgment was reversed, and the plaintiff recovered.<sup>1</sup>

Ward, 3 Caines, 73; Gilman v. Lowell, 8 Wend. 573; Rundell v. Butler, 7 Barb. 260; Phinckle v. Vaughan, 12 Barb. 215; Thompson v. Lusk, 2 Watts, 17, acc. — ED.

<sup>1</sup> Wyld v. Cookman, Cro. Eliz. 492; Marshal v. Dean, Cro. Eliz. 720; Broake v. Doughty, 1 Leon. 127; Heard v. Reed, Sty. 335; Jones v. Ballard, Godb. 444; Anonymous, Cro. Car. 337; Brumrigg v. Hanger, Hardr. 151; Coombs v. Rose, 8 Blackf. 155, acc.; Ramey v. Thornberry, 7 B. Mon. 475; Dedway v. Powell, 4 Bush, 77; Fowle v. Robbins, 12 Mass. 498; Perselly v. Bacon, 20 Mo. 330; Cole v. Grant, 3 Harr. (N. J.) 327; Kern v. Towsley, 51 Barb. 385; Spooner v. Keeler, 51 N. Y. 527; Hamilton v. Dent, Hayw. (N. Car.) 117; Rinehardt v. Potts, 7 Ired. 403; Bricker v. Potts, 12 Pa. 200. Conf. Cass v. Anderson, 33 Vt. 182. — ED.









## ERING v. STREETE.

IN THE KING'S BENCH, HILARY TERM, 1665.

[Reported in 1 Levinz, 156.]

CASE for saying to the plaintiff, "Thou hast stole as much lead out of my master's house as is as big as a house;" moved in arrest of judgment, that it might be lead fixed to the freehold; like the case in Croke,<sup>1</sup> "Thou hast stolen iron bars out of my master's windows," intended to be the iron bars fixed, and here it might be the covering of the house. But by the court, it might have been so intended, if the words had been "stole off my master's house;" but the words being "out of my master's house," it shall be intended lead there lying.

## ANONYMOUS.

IN THE KING'S BENCH, EASTER TERM, 1676.

[Reported in Freeman, 277.]

"THOU hast picked my pocket," without it be said, "feloniously," or "I will hang thee," or some such subsequent explanation, not actionable; for, as Wylde said, it is a common saying, "The lawyers have picked my pocket." 1 Roll. 68, 73.<sup>2</sup>

## NEWTON v. MASTERS.

IN THE COMMON PLEAS, MICHAELMAS TERM, 1678.

[Reported in 2 Levinz, 233.]

CASE by Baron and Feme for saying of the wife, she is a strumpet and a bawd, and kept a bawdy-house. After verdict for the plaintiff, it was moved in arrest of judgment that none of these words are actionable save the last, *scil.*, she kept a bawdy-house, and they are spoke in the *preter* tense, and so it may be intended that she kept a bawdy-house before the general pardon. But *per curiam*. The scandal

<sup>1</sup> Powell v. Hutchins, Cro. Jac. 204. — Ed.

<sup>2</sup> Bradshaw v. Walker, Hob. 249; Mason v. Thompson, Hutt. 38; Poland v. Mason, Hob. 305, 326; Stent v. —, Sty. 127; Watts v. Rymes, 1 Vent. 213; Dromant v. Westofer, Yelv. 136, *contra*. See Russell v. Wilson, 7 R. Mon. 261. — Ed.

remains, and it shall not be intended of keeping a bawdy-house before the pardon, unless it fully appears it was the meaning of the party, and that he so intended.<sup>1</sup>

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### GURNETH v. DERRY.

IN THE COMMON PLEAS, EASTER TERM, 1684.

[Reported in 3 Levinz, 166.]

CASE for saying, "Thou art a forsworn man, and didst take a false oath against me before Justice Scawen," *innuendo*, John Scawen, a justice of peace; and after verdict for the plaintiff, judgment was stayed; for, by the whole court, though to say that one is forsworn before a justice of peace is actionable, yet here it does not appear that Scawen was a justice of peace, except by the *innuendo*, which is not sufficient: Rutliche's Case;<sup>2</sup> and it may be the name of a man is Justice Scawen.

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### SOMERS v. HOUSE.

IN THE KING'S BENCH, MICHAELMAS TERM, 1693.

[Reported in Skinner, 364.]

"You are a rogue, and broke open a house at Oxford, and your grandfather was forced to bring over £30 to make up the breach." After a verdict for the plaintiff, it was moved in arrest of judgment, because "rogue" is not actionable, and breaking open the house was but a trespass, and making up the breach might be repairing. But the court seemed *e contra*; for, upon all the words together, a man who heard them could not intend other than that he meant a felonious breaking of the house; for the breaking as a trespasser could not make him a rogue. And though in the old books the rule was to take the words *in mitiori sensu*, yet, per Holt, C. J., they would give a favor to words, and would give a satisfaction to them who are hurt in their reputation, and would take words in a common sense according to the vulgar intendment of

<sup>1</sup> Y. B. 27 H. VIII. fol. 14, pl. 4; 1 Roll. Abr. 44, pl. 8; *Simpson v. Brook*, 1 Bulst. 138; *Chambers v. Ryley*, March, 212; *Garland v. Yarrow*, Sty. 322, 326; *Grove v. Hart*, Say. 33; *Huckle v. Reynolds*, 7 C. B. n. s. 114; *Martin v. Stillwell*, 13 Johns. 275; *Wright v. Paige*, 3 Keyes, 581, acc. See *Gavell v. Burket*, 1 Vent. 53; *Brayne v. Cooper*, 5 M. & W. 249; *Dodge v. Lacey*, 2 Ind. 212; *Peterson v. Sentman*, 37 Md. 140; *Eaton v. White*, 2 Pinn. 42; *Anon.*, Cro. El. 643, *contra*. Conf. *Hobson v. Blackwel*, 2 Sid. 15; *Pitts v. Pace*, 7 Jones, (N. Ca.) 558. — Ed.

<sup>2</sup> 4 Coke, 17.











the by-standers; and the rule *de mitiori sensu* is to be understood where the words in their natural import are doubtful, and equally to be understood in the one sense as well as the other; and after it was adjudged for the plaintiff; for the breaking of a house is felony without clergy, by the Statute of 1 Edw. VI. 13, par. 10, and it is in a common acceptance to be understood of such a breaking which is felony.<sup>1</sup>

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BAKER v. PIERCE.

IN THE QUEEN'S BENCH, TRINITY TERM, 1703.

[Reported in 2 Lord Raymond, 959.]

IN an action on the case for words, "John Baker stole my boxwood, and I will prove it." After a verdict for the plaintiff, Serjeant *Darnall* moved in arrest of judgment that those words are not actionable, for they shall be taken to mean wood growing or the like, whereof only a trespass can be committed. So to say, "You are a thief, and have stolen my timber, or my apples, or my hops," is not actionable. For where words may import either a felony or a trespass, they shall be taken in the mildest sense, unless there be other words to determine them in the worst sense. As to say, "He stole my timber out of my yard, or my hops in a bag." Clerk *v.* Gilbert;<sup>2</sup> Herbert *v.* Angell.<sup>3</sup> So Mason *v.* Thompson.<sup>4</sup> "I charge thee with felony for taking forth from J. D.'s pocket and I will prove it;" the words were held not to be actionable, because it should not be intended to mean a felony, not being directly affirmed. [But HOLT, C. J., and the court denied that case to be law, for the taking out of a man's pocket must be intended a felonious taking.] In this case the words may be taken to mean boxwood growing; and although the defendant might mean them in the worst sense, yet the intent of the speaker shall not make the words actionable unless the words express it sufficiently. Suppose the defendant had said, "He stole my coppice-wood."

*Mr. Broderick*, for the plaintiff. These words are actionable, and the difference is founded on this rule, *Arbor dum crescit, lignum cum crescere nescit*, and therefore boxwood in this case must be intended wood cut down, whereof a felony may be committed. *Higges v. Austen*.<sup>5</sup> "Thou hast stolen as much wood and timber as is worth twenty shillings," adjudged actionable. *Short's Case*;<sup>6</sup> 1 Roll. Action, 70, n. 47, 48; *Lifford v. Stamp*;<sup>7</sup> 2 Cro. 166; *Lo and Sanders*, 674;<sup>8</sup>

<sup>1</sup> Harris *v.* Adams, 1 Brownl. 3, *contra*. — ED.

<sup>3</sup> Hutton, 113.

<sup>4</sup> Hutton, 38.

<sup>6</sup> Noy, 114.

<sup>7</sup> March, 211.

<sup>2</sup> Hob. 331.

<sup>5</sup> Yelv. 152.

<sup>8</sup> Cro. Jac. 116.

Smith v. Ward;<sup>1</sup> Coote v. Gilbert;<sup>2</sup> 3 Cro. 471. The words in this case, according to common parlance, import a thing of which felony may be committed, and therefore he prayed judgment for the plaintiff.

HOLT, C. J. I have heard Twisden, J., say, he knew no rule to go by in actions for words.

GOULD, J. So said my Lord Hale; for all words stand on a different bottom.

HOLT, C. J. In most cases where such words as these have been held actionable, there are other words of an ill sense to explain them; as "I charge you with felony," or "You are a thief." And stealers of coppice-wood are called in common parlance stealers of wood.

POWELL, J. No action will lie for saying, "You have stole my coppice-wood," for that must be intended growing; but to say generally, "You have stole my wood," that must be intended wood cut down; and there are many cases founded on the difference in that verse cited by Mr. Broderick.

HOLT, C. J., agreed the difference.

POWELL, J. To say, "You are a thief, for you have stolen," or "You are a thief and have stole," must mean both the same. And though it was formerly held that there was a difference between them, yet of late it has been taken otherwise; for "for" or "and" are explanatory, and mean both the same thing.

HOLT, C. J. It has gone both ways.

Afterwards the court gave judgment for the plaintiff that the words are actionable, notwithstanding the opinion in 2 Cro. 166, to the contrary. And HOLT said, Sure the plaintiff must have judgment. It is not worth while to be very learned on this point; but where words tend to slander a man and take away his reputation, he shall be for supporting actions for them, because it tends to preserve the peace. I remember a story told by Mr. Justice Twisden of a man that had brought an action for scandalous words spoken of him, and upon a motion in arrest of judgment the judgment was arrested; and the plaintiff being in court at that time said, that if he thought he should not have recovered in his action, he would have cut his throat. POWELL, J. This case in 2 Cro. 166, cited by my brother Darnall, is so; but the later books are contrary, and I will stick to the latter authorities, being grounded on so much reason. GOULD, J., said that in the 10 Car. II., Mich. term, it was adjudged that these words, "Thou hast stole my wood," were actionable.<sup>3</sup>

<sup>1</sup> Hob. 77.

<sup>2</sup> Sty. 9.

<sup>3</sup> Lo v. Sanders, Cro. Jac. 166; Higgs v. Austen, Yelv. 152; Whitacre v. Hillidell, Aleyn, 11; Short's Case, Noy, 114; Paulin v. Forde, March, 211; Anon., Sty. 9; Burbank v. Horn, 39 Me. 233; Phillips v. Barber, 7 Wend. 439, acc.; Robins v. Hildredon, Cro. Jac. 65; Lisard v. Stamp, 2 Bulst. 81, *contra*. — Ed.











## TURNER v. OGDEN.

IN THE QUEEN'S BENCH, HILARY TERM, 1705.

[Reported in 2 Salkeld, 696.]

"THOU art one of those that stole my Lord Shaftesbury's deer," held not actionable; for though imprisonment be the punishment in those cases, yet, per HOLT, C. J., it is not a scandalous punishment. A man may be fined and imprisoned in trespass; for there must not only be imprisonment, but an infamous punishment; it is true, calling "papist" has been held actionable, but that was only in respect of the times.<sup>1</sup>

## HARRISON v. THORNBOROUGH.

IN THE QUEEN'S BENCH, HILARY TERM, 1714.

[Reported in Gilbert, 114.]

IN an action for words, the plaintiff declared that whereas he was a dyer, and there was a suit depending between him and B., and a trial was had, at which one Bell was a witness, and the defendant *tiel jour et ann' quoddam colloquium habens cum quodam Hugone Raw*, of the trial and Bell's evidence, and of the plaintiff, said these words, viz., "Harrison got a poor fellow, Bell, to forswear himself" (*innuendo* at the trial, *et tunc alloquendo præfat' Hug' Raw*), "you or he" (*innuendo quer'*) "hired him" (*innuendo* Bell) "to forswear himself."<sup>2</sup> Verdict for the plaintiff.

*Mr. Solicitor* and *Mr. Lutwyche* moved in arrest of judgment, that the action did not lie, that the words, "Harrison got a poor fellow to forswear himself," does not import a charge of subornation; for though it was alleged that they were spoke with relation to the evidence he gave at the trial, yet it was not shown that that evidence was material; and if he did forswear himself in an immaterial matter, that would not be perjury in him, and consequently not subornation in the plaintiff; but they insist that if these words taken by themselves would be actionable, yet the subsequent words (which appear to be spoken at the same time) had rendered them wholly uncertain. "You or he hired him," this explains the first words, and reduces them to this: "You or Harrison got a poor fellow to forswear himself," which

<sup>1</sup> See *Onslow v. Horne*, 3 Wils. 186, per Lord De Grey. Conf. *Barnabas v. Traunter*, 1 Vin. Abr. 396, pi. 15. — ED.

<sup>2</sup> Only so much of the case is given as relates to the first count. — ED.

is so uncertain, that it cannot be a scandal upon either. Roll. Lib. 81; 3 Cro. 497; Carter, 55.

But the court held that the first exception to the first count was only an exception to the form of laying the slander, that the speaker had not alleged the charge with such precise certainty as it ought to have been in an indictment, which was a rule they would never admit; that as to the words, "you or he hired him," they were a distinct slander, and only related to the payment of money, which was not material, and could not render the first words uncertain.

*Per curiam, judgment for plaintiff.*

### DAVIS v. MILLER.

IN THE KING'S BENCH, TRINITY TERM, 1741 OR 1742.

[Reported in 2 Strange, 1169.]

THESE words, "You cheated the lawyer of his linen, and stood bawd to your daughter, to make it up with him; you cheat everybody; you cheated me of a sheet; you cheated Mr. Saunders, and I will let him know it," — were held not actionable, without a *colloquium* of the plaintiff's trade or profession.<sup>1</sup>

### JONES v. HERNE.

IN THE COMMON PLEAS, EASTER TERM, 1759.

[Reported in 2 Wilson, 87.]

ACTION of slander for these words, viz., "You" (meaning the plaintiff) "are a rogue, and I" (meaning the defendant) "will prove you a rogue, for you forged my name." No special damage was laid in the declaration; there was a verdict for the plaintiff upon not guilty; and it was now moved by *Nares*, Serjt., in arrest of judgment, that these words are not actionable, to prove which he cited 3 Leon. 231, pl. 313, where the words, "Thou hast forged my hand," were held not actionable. But, *per totam curiam*, the saying a man is a forger, or has

<sup>1</sup> Anon., Dall. 45, 35; Anon., Moore, 29; George's Case, Cro. Eliz. 95; Somers-tailer v. —, Gold. 125, 12; — v. Gilbert, Ow. 47; Middlemore's Case, 3 Leon. 17; Gittings v. Redserve, Hutt. 13; Walcot v. Hind, Hutt. 14; Ludwell v. Hole, Stra. 696; Bellamy v. Barker, Stra. 304; Osborn v. Poole, Ld. Ray. 236; Welden v. Johnson, 1 Sid. 48; Tiverton v. —, W. Jones, 308; Killick v. Barnes, 2 Bulst. 138; Hopton v. Baker, 2 Bulst. 228; Tut v. Kerton, 1 Bulst. 172, acc.; Anon., Dall. 48, 26, *contra*. — Ed.









forged one's hand, is actionable; and they overruled this case in 3 Leon. WILLES, C. J., also said that, if it was now *res integra*, he should hold that calling a man a rogue, or a woman a whore, in public company, were actionable.

*Judgment for the plaintiff.*<sup>1</sup>

## BEAVOR v. HIDES.

IN THE COMMON PLEAS, EASTER TERM, 1766.

[Reported in 2 Wilson, 300.]

ACTION for scandalous words. Five sets were laid in the declaration, and upon the general issue there was a general verdict for the plaintiff upon the whole declaration. One of the sets of words were these, viz., "He" (meaning the plaintiff) "was put into the round-house for stealing ducks at Crowland," which were alleged to be spoken of the plaintiff by the defendant falsely and maliciously. And it was moved in arrest of judgment that the words were not actionable, for the defendant doth not say expressly that he stole the ducks, like the case in Cro. Eliz. 234. "I have served thee with the Queen's letter for stealing ducks in my mother's house," were held not actionable. "Thou art a false knave; thou wast arraigned for two bullocks," held not actionable. Cro. Eliz. 279. And it was said if the words had been, "Thou art a false knave, thou wast arraigned for stealing two bullocks," these words would not have been actionable, for a man may be arraigned for felony, and yet no felon. "James Steward is in Warwick jail for stealing a mare and other beasts;" after verdict the whole court gave their opinion *seriatim* that these words would not bear an action, for they do not affirm directly that he did steal the beasts. Hob. 177.

In answer, it was said for the plaintiff that these words are alleged to be falsely and maliciously spoken of the plaintiff by the defendant, and the jury have found that they were so maliciously and falsely spoken, like the case in Cro. Car. 263. "He was arraigned at War-

<sup>1</sup> Twaites v. Shaw, Gilb. 246; Sale v. Marsh, Cro. El. 178; Anstie v. Mason, Cro. El. 554; Goodale v. Castle, Cro. El. 554; Reynolds v. Briton, T. Ray. 4; Wade v. Buzzard, Cro. El. 607; Stone v. Smalcombe, Cro. Jac. 648; Andrews v. Bird, Hetl. 81; Morse v. Read, Ow. 47; Reynill v. Sackfield, 2 Bulst. 132; Baal v. Baggerly, W. Jones, 325; Motley v. Slaney, 1 Keb. 273; Wiltshire v. —, Yelv. 146; Nicholls v. Hayes, 13 Conn. 155; Atkinson v. Reding, 5 Blackf. 39; Drummond v. Leslie, 5 Blackf. 453; Hotchkiss v. Olmstead, 37 Ind. 74; Arnold v. Cost, 3 G. & J. 219; Gay v. Homer, 13 Pick. 535; Gorham v. Ives, 2 Wend. 534; Harmon v. Carrington, 8 Wend. 488; Alexander v. Alexander, 9 Wend. 141; Dorland v. Patterson, 23 Wend. 422; Ricks v. Cooper, 3 Hawks, 587, acc. Conf. Feise v. Linder, 3 B. & P. 372; Mills v. Taylor, 3 Bibb, 469; Jackson v. Weisyer, 2 B. Mon. 214; Atkinson v. Scammon, 22 N. H. 40; Andrews v. Woodmansee, 15 Wend. 232; Pearis v. Harrah, Tapp. 254. — Ed.



wick for stealing of twelve hogs, and if he had not made good friends, it had gone hard with him;" *ubi re vera* he never was arraigned for felony. After a verdict these words were held to be actionable, being laid to be spoken falsely and maliciously. "Thou art a clipper, and thy neck shall pay for it," after a verdict, held actionable, though the word "clipper" be ambiguous. Skin. 183. "You are a rogue, and broke open a house at Oxford, and your grandfather was forced to bring over £30 to make up the breach," held actionable, though the word "rogue" is not, and breaking open a house is only a trespass. Skin. 364. "He was sent to prison for running wool," held to be actionable by Lee, C. J., at Guildhall. "He was whipped about Taunton Castle for stealing sheep," were held actionable. 1 Roll. Abr. 50, pl. 9.

This motion in arrest of judgment was made in Michaelmas term last, when the court thought the cases cited for the defendant were in point, that these words are not actionable.

LORD CAMDEN said, If we should judge these words actionable, many actions would arise at every assizes in the kingdom, where the common topic of conversation is that such a man was sent to jail for such a crime, and such a one was arraigned and tried, &c., and if such words are true, where is the slander saying "a man was whipt," if the words are true, is no slander.

BATHURST, J., also inclined to think the words were not actionable, but thought that if this particular set of words were not proved at the trial, the *postea* (upon the judge's certificate that they were not proved) might be amended, and a verdict for the defendant entered as to this set of words, if any precedent for it could be found; for, he said, if they were not proved, the plaintiff ought not to have had a verdict upon them; but if this cannot be done, he thought the cases cited for the defendant so strongly in point that the court were bound by them. GOULD, J., was of the same opinion, and said the case in Hob. 177, was so strong for the defendant, and so solemnly determined, that he could not well go over it.

LORD CAMDEN, in answer to Mr. Justice BATHURST, said it would be very dangerous, after a verdict of twelve men recorded by the court, to refer to the judge's notes, in order to alter it; and he thought there was no precedent of such a case, and that a verdict cannot be varied. And the court at this time pronounced that the judgment must be arrested, unless cause the last day of the term (Hilary term last). But at that day they adjourned it for further consideration; and after having taken time till this term, the court changed their opinion, and gave judgment for the plaintiff, that the words were actionable.

LORD CAMDEN. Upon considering this case more fully, we are now all of opinion that these words, being laid in the declaration to be spoken falsely and maliciously of the defendant, are actionable; we must take









it upon this record that the plaintiff was really not put in the round-house or imprisoned for stealing of ducks, because the jury have found that the words were falsely spoken; the words clearly import that the plaintiff had been guilty of a crime, and, if the fact had been true, the defendant might and ought to have justified; if we should arrest the judgment, the malevolent would think the plaintiff had been guilty of the crime falsely imputed to him, and the good-natured could not help suspecting him to have been so. We lay great stress upon the word "false;" if words are true, they are no slander, but may be justified. The objection here is that the words do not expressly allege that the plaintiff stole ducks; but words are to be taken according to the common parlance, and to be spoken in the worst sense, according to the common understanding of the by-standers. Cro. Jac. 154. "I know what I am, I know what Snell is, I never buggered a mare," it was objected these words were not actionable, for they do not charge the plaintiff with buggery; but the court said they implied a charge of buggery, and gave judgment for the plaintiff. 2 Lev. 150. The words in the present case must be taken to be false, and to throw a stain upon the plaintiff's character.

*Judgment for the plaintiff per totam curiam.*<sup>1</sup>

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### OLDHAM v. PEAKE.

IN THE COMMON PLEAS, MICHAELMAS TERM, 1774.

[Reported in 2 Blackstone, 959.]

**ACTION** for words. The plaintiff declares that, on a *colloquium* concerning the death of one Daniel Dolly, the defendant said to the plaintiff, "You are a bad man, and I am thoroughly convinced that you are guilty" (meaning of the murder of the said Dolly), "and rather than you should want a hangman, I would be your executioner." And being told the words were actionable, and being asked how he could prove what he said, he answered, "I will prove it by Mrs. Harvey." 2. "You are a bad man, and I am thoroughly convinced that you are guilty" (*innuendo* as before), "and rather than you should want a hangman, I would be your executioner." Being asked how he could prove the plaintiff guilty of the murder, he said, "I can prove it by Mrs. Harvey."

<sup>1</sup> Roll. Abr. 50, pl. 9, acc.; Nuttal v. Page, T. Ray. 17; Halley v. Stanton, Cro. Car. 268; Heynes v. Sprot, Cro. Jac. 247; Showel v. Haman, Cro. Jac. 154; Gainford v. Tuke, Cro. Jac. 536; Anon., Moor, 866; Willymote v. Wetton, Cro. Eliz. 904; Carpenter v. Tarrant, Cas. temp. Hard. 339; Searle v. Maunder, 2 Rolle, R. 141; Royal v. Peckham, Cro. Eliz. 786; Brown v. Audley, Yelv. 68; Snell v. Webbling, 2 Lev. 150; Redfern v. Todd, Cro. Eliz. 589. — ED.

3. "You are guilty" (*innuendo* as before), "and I will prove it." 4. "I am thoroughly convinced that you are guilty" (*innuendo*, of the death of the said Dolly), "and rather than you should go without a hangman, I would hang you." 5. "You are guilty" (*innuendo*, of the murder of the said Dolly). By reason whereof, and to clear his character, the plaintiff was obliged to procure, and did procure, an inquest, in due form of law, to be taken on the body of the said Daniel Dolly. On not guilty pleaded, the jury found a general verdict on all the counts for the plaintiff, with considerable damages.

*Glyn, Walker, and Grose* moved in arrest of judgment that none of the words were actionable in themselves without special damages assigned, and that the special damage here assigned was not sufficient to maintain the action.

*Davy, Hill, and Adair* showed for cause that every one of the counts contained matter actionable. "Guilty of the death," implies such a death as is effected by guilt. "Thou hast killed a man," or "killed thy wife," held actionable. *Godfrey v. Moor*; <sup>1</sup> *Talbot v. Case*; *Wilner v. Hold*; <sup>2</sup> 1 Roll. Abr. 77, pl. 2, 3, s. p.

"I am thoroughly convinced" is a direct assertion. It affects a man's character, "I am persuaded in my conscience," held actionable. *Sydenham v. Man*; <sup>3</sup> 1 Roll. Abr. 79. "I think." *Cro. Eliz.* 348. "I dreamt it," held actionable in *Scan. Mag.* "For aught I know." *Styl.* 142.

It is objected that the *innuendo* of murder is overstrained, there being no *colloquium* laid of murder, but only of the death. But if words are actionable in themselves, the impertinence of an *innuendo* will not vitiate the action. 3 Bulst. 227. But here the *innuendo* is warrantable from the *colloquium*.

In support of the rule they relied on *Miller v. Buckdon*.<sup>4</sup> "You was the cause of the death of Dowland's child, and I will swear it on a book;" not actionable, being too general. It was also said to be sufficient, if any one count cannot be supported; and the fifth cannot, being only, "You are guilty;" and the rest supplied by an *innuendo*, which introduces new matter, and does not apply to the *colloquium*.

GOULD and BLACKSTONE, JJ. (*absentibus* DE GREY, C. J., and NARES, J.), were of opinion that this declaration would support the action. If the fourth and fifth counts can be supported, all the rest certainly may, these being the weakest of any.

1st. As to the certainty of the charge. I am thoroughly convinced is equal to a positive averment; for a man only avers a thing because he is convinced of the truth of it. 2d. Death must be understood to mean murder, because it is such a death as the plaintiff might be liable

<sup>1</sup> *Cro. Eliz.* 317.

<sup>2</sup> *Cro. Car.* 489.

<sup>3</sup> *Cro. Jac.* 407. †

<sup>4</sup> 2 Bulst. 10.











to be hanged for. By the statute of the 3 Edw. I. st. 1, persons taken for the death of a man are not bailable. So in *Christian v. Adams*,<sup>1</sup> "He did conspire the death of I. S.," held actionable. As to *Miller v. Buckden*, "Thou wast the cause of the death," very different from, "Thou art guilty of the death;" for a man may be an innocent cause. 3d. 'The *innuendo* of murder is warrantable, though the *colloquium* is laid to be of the death. Death is the genus, and murder the species. When the conversation was of the death of Dolly, and the defendant says the plaintiff is guilty of it, he must mean such a species of death as would infer guilt. Murder is such a species. It is not, therefore, contradictory, but explanatory; not introductory of new matter, but ascertaining the meaning of the old, and limiting the general word "death" to one particular species of it, — murder. The *innuendo* is therefore sufficiently regular. Whether it was true or not that such was the defendant's meaning was a fact for the jury to decide upon. They have affirmed it; and it is now too late to object to it.

*Rule discharged.*<sup>2</sup>

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COLMAN v. GODWIN.

IN THE KING'S BENCH, MAY 4, 1782.

[Reported in 3 Douglas, 90.]

THIS was an action for words charging the plaintiff with sodomitical practices. The declaration contained several counts, one of which, reciting that there was a suspicion of one Hooper being guilty of sodomitical practices, stated a *colloquium* about him and the plaintiff being guilty of such practices, and that in that discourse the defendant spoke the following words: "I have seen Colman go into Hooper's house and stay there all night instead of going home to his wife." *Innuendo*, that the plaintiff had been guilty of sodomitical practices with Hooper. The jury found a verdict for the plaintiff with £500 damages; and the defendant having moved in arrest of judgment,

*Lee, S. G., Wilson, and Piggot*, showed cause. It has been long held that the sense of the words is a matter to be left to the jury; it was properly so left in this case, and they have found that the words were spoken with the meaning attributed to them by the plaintiff. The most innocent words may be spoken in such a manner as to be actionable. The finding of the jury is conclusive, be the words what they may, otherwise there is an end of the office of an *innuendo*.

*Wallace, Bearcroft, and Baldwin*, contra. The words themselves

<sup>1</sup> 4 Leon. 54.

<sup>2</sup> Affirmed on error to King's Bench, see Cowper, 275. — ED.

must afford a strong suspicion of the sense put upon them by the *innuendo*; and the *innuendo* will not carry the meaning of the words any further, or render them actionable, when without the *innuendo* they would not be so. *King v. Bowen*.<sup>1</sup> Actions of this kind are only maintainable where the words imply a criminal charge; but no indictment would lie for "sodomitical practices."

LORD MANSFIELD. It is objected that the law knows no such crime as sodomitical practices; but the real question is, whether the words spoken do not, in vulgar parlance, signify an offence which in law is termed an assault with intent to commit sodomy. The *colloquium* renders this plain. All words depend for their meaning on the subject-matter, and that is to be left to the jury.

WILLES, J., of the same opinion.

ASHHURST, J. I am of the same opinion. The effect of the words on the hearers is what is to be considered. The determinations in the old books are a disgrace to the law.

BULLER, J. Could these words bear the meaning that the defendant intended to impute sodomy? They certainly may. The meaning of the words is to be gathered from the vulgar import, and not from any technical legal sense.

*Rule discharged.*

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## CHRISTIE v. COWELL.

AT NISI PRIUS, CORAM LORD KENYON, C. J., MAY 26, 1790.

[*Reported in Peake, 4.*]

THIS was an action for words. The words proved were, "He is a thief, for he has stolen my beer."

It appeared in evidence that the defendant was a brewer, and that the plaintiff had lived with him as servant; in the course of which service he had sold beer to different customers of the defendant, and received money for the same, which he had not duly accounted for.

LORD KENYON directed the jury to consider whether these words were spoken in reference to the money received and unaccounted for by the plaintiff, or whether the defendant meant that the plaintiff had actually stolen beer; for if they referred to the money not accounted for, that being a mere breach of contract, so far explained the word "thief" as to make it not actionable. Thus if a man says to another, "You are a thief, for you 'stole my tree,'" it is not actionable, for it shows he had a trespass and not a felony in his contemplation.

*The jury found for the defendant.*

<sup>1</sup> Hutt. 44.











## SAVILE v. JARDINE.

IN THE COMMON PLEAS, JUNE 22, 1795.

[Reported in 2 *Henry Blackstone*, 531.]

IN this action for words the declaration contained five counts. The first, second, and fourth were for words spoken of the plaintiff in his trade or business as an auctioneer, and were clearly actionable. The third and fifth counts, without any *colloquium* of the plaintiff's trade, stated the words to be, "You are a swindler," and special damage was laid by reason of the speaking, which said several words in the declaration, &c. Plea: General issue. Verdict for the plaintiff on the whole declaration, with one shilling damages.

A rule having been granted to show cause why the prothonotary should not tax the plaintiff his full costs, though the damages were under 40s.

*Adair*, Serjt., showed cause, insisting that if the words in any one count were in themselves actionable, and the damages were under 40s., the plaintiff was entitled to no more costs than damages, according to the Stat. 21 Jac. c. 16, § 6, nor would the addition of special damage vary the case. *Collier v. Gaillard*.<sup>1</sup> Besides, to call a man a swindler is actionable.

*Clayton*, Serjt., in favor of the rule, argued that to call another a swindler was not actionable. The word "swindler" has no definite meaning. In common acceptation it only imports cheating, dishonesty, or fraud. It is indeed libellous if written and published. *Tanson v. Stuart*.<sup>2</sup> But many words are libellous if written that are not actionable if spoken; such, for instance, as those which tend to make a man ridiculous, or to cause him to be avoided in society as having a noisome disease. *Villers v. Monsley*. To say to a man, "You are a swindler," is no more than saying, "You are a cheat, or a dishonest person;" and those words, not applied to an office or trade, are not actionable. *Tamlin v. Hamlin*; <sup>3</sup> *Todd v. Hastings*; *Davis v. Miller*. The verdict being general, some damages must be intended to be given on each count, and as the words in the third and fifth counts are not actionable, the damages in respect of those counts were given for the special damage.

ETRE, Ld. C. J. If the "swindler" be not actionable, my brother Clayton has established his point. I think it only equivalent to cheat; it cannot be carried further, and that is not actionable. I cannot well account for the decisions that the calling a man a thief is actionable;

<sup>1</sup> 2 *Black*. 1062.<sup>2</sup> 1 *Term Rep. B. R.* 748.<sup>3</sup> 2 *Salk*. 694.

but the calling him a cheat is not so, unless it be that thief always implies felony, but cheat not always.

BULLER, J. The word "cheat" has always been holden not to be actionable, and "swindler" means no more; when a man is said to be swindled, it means tricked or outwitted.

HEATH, J., and ROOKE, J., of the same opinion. *Rule absolute.*<sup>1</sup>

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## HOLT v. SCHOLEFIELD.

IN THE KING'S BENCH, MAY 30, 1796.

[Reported in 6 Term Reports, 691.]

IN an action for slander, the declaration stated that the plaintiff was a person of good name, and never was guilty, nor, before the uttering of the words hereinafter mentioned, suspected to have been guilty, of perjury; yet the defendant, maliciously intending to injure the plaintiff in his good name, and to bring him into public infamy and disgrace, and to subject him to the punishment provided by the laws of this realm against persons guilty of wilful and corrupt perjury, on, &c., spoke and published of and concerning the plaintiff these false, scandalous, and malicious words, viz., "Tim Holt" (meaning the plaintiff) "has forsworn himself" (meaning that the plaintiff had committed wilful and corrupt perjury); "and I" (meaning the defendant) "have three evidences that will prove it." The second count charged the defendant with uttering these words to another person, of the plaintiff: "You know he is perjured." The third count was that he (the plaintiff) was perjured. The fourth count was, "You" (the plaintiff) "are perjured; you have forsworn yourself." To which the general issue was pleaded, and the plaintiff obtained a verdict for £50 damages.

*Topping* and *Holroyd* in the last term obtained a rule calling on the plaintiff to show cause why the judgment should not be arrested for a defect in the first count, contending that as the damages were entire if one count were bad the judgment must be arrested generally. The words in the first count, "he has forsworn himself, and I have three witnesses to prove it," are not in themselves actionable, because they do not necessarily imply that the plaintiff had forsworn himself in

<sup>1</sup> Richardson v. Allen, 2 Chitty, 657; Wilby v. Elston, 8 C. B. 142; Ford v. Johnson, 21 Ga. 399; Lucas v. Flinn, 35 Iowa, 9; Caldwell v. Abbey, Hardin, 529; Winter v. Sumvalt, 3 H. & J. 38; Stevenson v. Hayden, 2 Mass. 406; Odiorne v. Bacon, 6 Cush. 185; Chase v. Whitlock, 3 Hill, 139; Weil v. Altenhofen, 26 Wis. 703, acc.; Marshall v. Addison, 4 H. & McH. 537, contra. — Ed.









a judicial proceeding, which alone will constitute the crime of perjury; and the meaning of them cannot be varied by an *innuendo*, unless with reference to some *colloquium* (which is not here stated) from whence it might appear that the words were spoken concerning some judicial proceeding that had before taken place in which the plaintiff had given testimony, and which ought to have been averred in order to warrant the *innuendo*. And they cited 1 Roll. Abr. 39; 3 Inst. 166; 4 Co. 17 *b*; Hardr. 151; 3 Lev. 166; 2 Bulst. 140; Cowp. 684.

*Erskine, Bayley, and F. Vaughan* now showed cause against the rule. The obvious and known meaning of the word "forsworn" is an imputation of perjury upon the party concerning whom it is spoken; and such is the sense in which it is explained not only in Johnson's Dictionary, but in a case expressly adjudged upon the subject of *Smale v. Hammon*,<sup>1</sup> where the words were, "Thou wert forsworn, and I can prove thee forsworn when I will;" which were held actionable upon a motion in arrest of judgment, Williams, J., saying that the rule was, that where the words spoken tend to the infamy, discredit, or disgrace of the party, they are actionable. The case of *Croford v. Blisse* was very different from the present, for the words "forsworn man," applied by the defendant to the plaintiff, were considered by the court as spoken generally of him; because, although there was a previous *colloquium* of a cause in a court baron, it did not appear to be such a cause wherein perjury could be committed. Besides, at that period the rule prevailed that words should always be construed *in mitiori sensu*, which is now exploded. But if a word will bear two different interpretations, it may be shown by introductory matter or by *innuendo* to have been used in the sense imputed to it, according to the principle laid down by De Grey, Ld. C. J., in delivering the opinion of the judges on the case of the *King v. Horne*,<sup>2</sup> in the House of Lords. In the case of a libel, says he, which does not in itself contain the crime without some extrinsic aid, it is necessary that it should be put upon the record by way of introduction, if it be new matter, or by way of *innuendo* if it be only matter of explanation. And this kind of extrinsic matter, he says further, may be introduced upon the record either by direct averment, or by recitals, or by general inference. Now here there is no new matter necessary to be introduced; for it must be admitted that if the defendant had charged the plaintiff with being perjured, it would have been sufficient, and the word "forsworn," in its most usual though not necessary sense, meaning the same thing, it is sufficient by way of *innuendo* to affix that meaning to it. If the jury, on the trial of this case, had not been satisfied of the truth of the

<sup>1</sup> 1 Bulst. 40.

<sup>2</sup> Cowp. 684.



*innuendo*, and that "forsworn" meant wilful and corrupt perjury, they ought to have found a verdict for the defendant. Still stronger is it when that word is coupled with the introductory matter in the first count, where it is stated that the words imputed to the defendant were uttered by him with intent to bring the plaintiff into public infamy and disgrace, and to subject him to the punishment provided by the laws of this realm against persons guilty of wilful and corrupt perjury; which could not be, unless the charge were of such a nature of false swearing as comes within the legal definition of perjury. The *innuendo*, therefore, does not enlarge the sense of the word spoken, but merely explains and gives it its proper signification. In *Oldham v. Peake*, the plaintiff declared that on a *colloquium* concerning the death of one Daniel Dolly, the defendant said to the plaintiff, "I am thoroughly convinced that you are guilty," *innuendo*, of the murder of the said D. D., which *innuendo* was held good; and yet the crime of murder could less easily be affixed to the sense of the word "death" than the word "forsworn" may mean perjured; and at all events the phrase "guilty of the death" might as well be applied to the crime of manslaughter as to that of murder. But the court there said that the *colloquium* was not contradictory but explanatory, not introductory of new matter, but ascertaining the meaning of the old; so the same observation will apply with equal force to the *innuendo* in this case. Secondly, the other counts, and especially the last two, are at all events good; and, therefore, judgment cannot be arrested *in toto*, according to *Grant v. Astle*,<sup>1</sup> but there must be a *venire de novo*; or the verdict may be amended by the judge's notes, and entered up on the good counts.

LORD KENYON, C. J. The only case that warrants this mode of declaring is that in *1 Bulstrode*; but that seems to be against the current of authorities. Either the words themselves must be such as can only be understood in a criminal sense, or it must be shown by a *colloquium* in the introductory part that they have that meaning, otherwise they are not actionable. I remember a case here many years ago where the judgment was arrested on an information for a libel on some justices in Suffolk, because there was no averment that the libel was of and concerning the justices in Suffolk.<sup>2</sup>

GROSE, J. There is a distinction in the books between being perjured and being forsworn: the former means false-swearing in a judicial proceeding, but the other has not the same meaning.

LAWRENCE, J. The plaintiff wishes us to consider the introductory part of this declaration in the nature of a *colloquium*; but if that

<sup>1</sup> Dougl. 722.

<sup>2</sup> *Vid. R. v. Alderton*, Say. 20.









could be done, none of the objections in the books could have prevailed, because the same sort of introduction is inserted in almost all the declarations. With regard to the case in 1 Bulstrode, I think that Williams, J., goes too far in saying that words that "tend to the infamy, discredit, or disgrace of the party" are actionable. That rule is too general; the more correct rule is laid down in *Onslow v. Horne*.<sup>1</sup> "The words must contain an express imputation of some crime liable to punishment, some capital offence, or other infamous crime or misdemeanor." There is also a case in 1 Sid. 48, that is directly contradictory to the case in Bulstrode. And if the words here are not actionable in themselves, their meaning cannot be extended by an *innuendo*. 4 Co. 17 b. That case is an express authority to show that "forsworn" cannot be explained by an *innuendo* to mean false swearing in a court of justice.

The court were of opinion that there should not be a *venire de novo*, and that as the damages were entire the judgment must be arrested *in toto*.<sup>2</sup> And

LAWRENCE, J., said that the plaintiff ought not to be at liberty to amend by the judge's notes in this case, because the evidence applied as well to the bad as to the good counts.<sup>3</sup> *Judgment arrested*.<sup>4</sup>

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## WOOLNOTH v. MEADOWS.

IN THE KING'S BENCH, NOVEMBER 13, 1803.

[Reported in 5 East, 463.]

IN an action on the case for slander, the plaintiff declared, that whereas he had never been guilty nor suspected of the detestable crime of buggery, or of any other such detestable crime, or of any attempt or disposition to commit the same, &c., but had obtained the good opinion of divers subjects, and had been proposed as a volunteer for the defence of the country at a certain society, &c.; yet the defendant, knowing the premises, but maliciously intending to injure the plaintiff, and to subject him to the pains and penalties of the law, &c., and to cause it to be believed that he was a person of

<sup>1</sup> 3 Wils. 186.

<sup>2</sup> *Sed vid.* Auger v. Wilkins, Barnes, 478; and Eddowes v. Hopkins, Dougl. 377.

<sup>3</sup> *Vid.* Eddowes v. Hopkins, Dougl. 377.

<sup>4</sup> Stanhope v. Blith, 4 Rep. 15; Danell's Case, 1 Sid. 48; Anon., Cro. Eliz. 609; Wyson v. Fenton, Cro. Eliz. 788; Hawkes v. Hawkey, 8 East, 427; Hall v. Weedon, 8 D. & Ry. 140, acc.; Morton v. Leedell, 1 Brownl. 4; Smale v. Hammon, 1 Bulst. 40, *contra*. — ED.

unnatural passions, and guilty of the crimes aforesaid, or some of them, and to cause him to be rejected as a volunteer by the said society, and to be abhorred and shunned by all mankind, as a person unfit for and unworthy of all society, on, &c., in a certain discourse which the defendant had with divers subjects, members of the said society, &c., wrongfully, falsely, and maliciously spoke these false, scandalous, and malicious words of and concerning the plaintiff having been proposed as a volunteer as aforesaid, viz.: "His" (meaning the plaintiff's) "character is infamous. He would be disgraceful to any society. Whoever proposed him must have intended it as an insult. I will pursue him and hunt him from all society. If his name is enrolled in the Royal Academy, I will cause it to be erased, and will not leave a stone unturned to publish his shame and infamy; delicacy forbids me from bringing a direct charge, but it was a male child of nine years old who complained to me" (meaning that a male child of nine years old had complained to the defendant of some unnatural crime committed by the plaintiff upon such male child). And then the plaintiff averred that the words were so uttered and published by the defendant with intent and meaning to convey, and that the same were by the said persons in whose presence they were so uttered and published, understood and believed to convey, a charge against the plaintiff, that he was a person of unnatural passions and appetites, and was capable of committing, and had committed, the abominable crime of buggery, and was thereby rendered infamous, and unworthy of all society, &c. There were several other counts, laying the same charge in different ways. To this the defendant pleaded, first, the general issue; secondly, as to the words laid in the first count, that before the speaking and publishing them, to wit, on, &c., a certain male child of nine years old, to wit, one A. B., did complain to the defendant of an unnatural crime before that time committed by the defendant upon such male child. And so the defendant justifies speaking the words. To this there was a general demurrer; and to this and a third plea to the same count, in substance the same, there were assigned as special causes of demurrer, that the defendant had not justified or answered the special matter of the first count, nor had averred that the complaints in those pleas respectively alleged to have been made to the defendant were true, or that the defendant believed the same to be true; and that the matter of whose pleas do not amount to a traverse of the first count, but are consistent therewith, &c.; and that the matters attempted to be put in issue by those pleas are immaterial, &c. The same causes of demurrer were assigned to the fifth plea, which contained a similar justification of the words as laid in the other counts of the declaration. And to











the fourth and sixth pleas, the one applying to the first, and the other to all the counts, alleging, by way of justification, the fact of the plaintiff's having committed the crime imputed to him as well as the relation of A. B.'s complaint to the defendant before the uttering of the words, the plaintiff replied *de injuria sua propria absque tali causa*.

*Scarlett*, in support of the demurrer, relied on the authority of the rule in Lord Northampton's Case, recognized in *Davis v. Lewis*,<sup>1</sup> that if one speak slanderous words, without naming at the same time the person from whom he heard them, he cannot afterwards justify it by naming the original slanderer. The reasons for which are, that, by naming the person at the time, he gives the party injured an action against such slanderer, and is himself a witness to prove it; and he also does not pledge his own credit to the slander, but merely that of the first relator of it, which so far abates the injurious effect of it. Upon this ground the justifications demurred to, where the name of the original author of the slander is first mentioned, are bad. But further, it would not be enough for the defendant even to name the author if, as in this case, he repeat the slander in such a manner as to signify his own belief of and intention to act upon it. As in *Maitland v. Goldney*,<sup>2</sup> it was considered by Lord Ellenborough that one who repeated slander, after knowing it to be unfounded, could not justify it by having named his author at the time.

*Burrough*, contra, contended that the declaration itself was bad, because there was no direct negative of the boy's having made the complaint, as in *Meggs v. Griffith*,<sup>3</sup> which accounts for the question of justification having been there entered into upon the plea of not guilty, which put in issue the fact of the defendant having heard the slander from another before he repeated it. And *Crawford v. Middleton*<sup>4</sup> is in point to this, where the plaintiff having declared for slanderous words charging him with felony, said by the defendant to have been spoken of the plaintiff by a person whom the defendant met on the road, judgment was arrested by the opinion of three judges for want of an averment that in truth nobody had said such words to the defendant; against the opinion of Twisden, J., who thought that the words being laid to be spoken falsely and maliciously, and so found by the verdict, was a proof that nobody had said so to him. [LORD ELLENBOROUGH, C. J. The rule in Lord Northampton's Case, confirmed in *Davis v. Lewis*, is, that slanderous words can in no case be justified upon the report of another, unless the name of the original slanderer be given at the time.] Those cases only apply where an

<sup>1</sup> 7 T. R. 17.

<sup>3</sup> Cro. Eliz. 400.

<sup>2</sup> 2 East, 426.

<sup>4</sup> 1 Lev. 82.

action would lie upon the words against the original speaker. But here no action could have been maintained against the boy upon any words imputed to him. And where words are uncertain in themselves, as those spoken by the defendant, they cannot be rendered more certain by an *innuendo*, without first introducing prefatory matter to which they may be applied, as was settled in *Rex v. Horne*.<sup>1</sup> An *innuendo* cannot enlarge the sense, which is attempted to be done, by introducing under it that the words spoken, which were merely that a male child had complained to the defendant, meant that such male child had complained to the defendant of some unnatural crime. [LORD ELLENBOROUGH, C. J. Consider the case, then, as if the *innuendo* were struck out, and attend to the words themselves, whether, when taken altogether, they do not naturally import a charge of this sort. GROSE, J. We must read the words in the same sense as common people who heard would understand them.] The words are certainly abusive; but they do not in themselves necessarily point to the particular crime, though they might have been shown to have done so by introductory matter. If the plaintiff had been before charged with having been guilty of indecency to a woman, these words would have been equally applicable.

*Scarlett*, in reply, observed, that the opinion of the three judges in *Crawford v. Middleton* went upon the ground that the defendant might have justified the slanderous words upon the report of another, without naming him at the time, which was contrary to the rule in *Lord Northampton's Case*, now settled to be law. That from the frequency of actions for slander in former times the judges were accustomed to construe the words *in mitiori sensu*, where they would in strictness admit of different constructions; but since the case of *Baker v. Pierce* a more sensible rule has prevailed, namely, to construe words in the sense in which they are commonly understood, as applied to the subject-matter. And *Phillips v. Kingston*<sup>2</sup> is to the same effect. [LAWRENCE, J. Many of the old cases on slander went to a very absurd length. There is one<sup>3</sup> where the charge was, that the plaintiff "had struck his cook on the head with a cleaver, and cleaved his head; the one part lay on one shoulder, and another part on the other;" and yet the judgment was arrested after verdict, because it was not directly averred that the cook was killed, but only argumentatively. But all those cases have been long set at rest.] Then as to the objection that the words do not point at any certain crime, it is impossible to read them without understanding what sort of crime was

<sup>1</sup> Cowp. 684.

<sup>2</sup> 1 Vent. 117.

<sup>3</sup> This is the case of *Sir T. Holt v. Astgrigg*, Cro. Jac. 184.











meant to be imputed. The only use of the *innuendo* was to fix the defendant's intention to be to use the words in the common acceptance of them. The words state that the plaintiff is unfit for all society; that he is unfit for the society of men; that the defendant would publish his shame and infamy; that he was restrained by delicacy from bringing a direct charge, and that the complaint was made to him by a male child of nine years old.

LORD ELLENBOROUGH, C. J. (after stating the pleadings). The pleas demurred to are bad, because they fall directly within the rule laid down in Lord Northampton's Case, which was confirmed in the late case of *Davis v. Lewis*,<sup>1</sup> that in order to enable a defendant to justify slanderous words upon hearsay he must disclose at the time of uttering the slander the name of the person from whom he heard it, and it is not sufficient to name him for the first time by his plea; the object of which is to give the plaintiff his action in the first instance against the original author of the slander. The pleas, then, being out of the way, the question arises upon the sufficiency of the words laid in the declaration to maintain the action. And it is first objected that it should have been averred that nobody had made the complaint stated to the defendant. But that objection is founded upon the supposition that, if it had been so averred, the defendant would have been let into proof that such complaint had in fact been made to him, and that he could have thereby justified speaking the words. Lord Northampton's Case, however, is an answer to that. If there had been such an averment, it would have been wholly immaterial to the defendant's justification, because he did not name the party at the time from whom he received the complaint. That brings it to the second question: whether the words spoken, unassisted by the *innuendo* at the conclusion of them, — which, it must be admitted, can only explain and cannot extend the meaning of the antecedent words, — do in their plain obvious meaning import the charge of any certain crime; and upon that I think there can be but one opinion. The defendant begins by saying that the plaintiff's character is infamous. That of itself might only import general infamy; that he would be disgraceful to any society; that whoever proposed him must have intended it as an insult, meaning to the particular society of which he was proposed as a member; that is somewhat stronger, but might still be general. Then he says, he will pursue and hunt him from all society. That shows that he intended to speak of some crime which rendered him unfit for society. Then he says that delicacy forbids him from bringing a direct charge. That points to some species of infamy,

<sup>1</sup> 7 Term Rep. 17.

mixed with the intercourse of the sexes ; and of what nature that was he alludes in a manner not to be mistaken, when he adds that it was a male child of nine years old who complained to him. What else could the defendant mean by these expressions but to charge the plaintiff with some infamous crime which would expel him from all society, and that crime relative to a male child, which delicacy forbade him to make the subject of a direct charge. Applying our understanding to these words like any common persons, can we give them any other meaning than that which the pleader meant to give them by the *innuendo* at the conclusion. But it does not stop here, for the count goes on to aver "that the words were so uttered and published by the defendant with intent and meaning to convey, and that the same were by the persons in whose presence they were so uttered understood and believed to convey, a charge of an unnatural crime against the plaintiff." Now, upon a count so framed, the plaintiff must have gone into other proof than that of the mere speaking of the words, and he must have not only shown that the defendant's meaning was to impute a crime of that nature to the plaintiff, but that the words were so understood by the hearers. Therefore, not only upon the words themselves, but followed as they are by the last-mentioned averment, we must take them to have been spoken in the sense imputed.

GROSE, J. We are first to consider whether the declaration be bad ; and if that be sufficient, whether the pleas in question be an answer to it. As to the declaration, I agree that the *innuendo* cannot extend the meaning of the words ; and then the question is, whether the words be in themselves actionable. Now a court of justice must read the words in the same sense in which the hearers would, at the time they were spoken, understand them. When I first read them I had no idea that any serious doubt could be entertained of the sense meant to be conveyed by them ; namely, an imputation of an unnatural crime. I think so still, and therefore must consider the declaration as sufficient. Then as to the sufficiency of the pleas demurred to, I cannot say, under the authority of the late determinations, that those pleas can be supported. The question having been so lately under consideration, it is unnecessary to enlarge upon it ; it is sufficient to say that I adhere to the rule laid down in *Maitland v. Goldney*,<sup>1</sup> as collected from the former cases, that, in order to justify the repetition of slanderous words spoken by another, the defendant must give a certain cause of action against that other by naming the author of the slander, and giving the very words which he used.

<sup>1</sup> 2 East, 437.









LAWRENCE, J. On the authority of Lord Northampton's Case, and the subsequent cases, I agree that the pleas demurred to are bad; and I think that the rule on which they proceed is a good one,—that if a party will repeat slanderous words which he hears another say, he ought to do so in such a manner as will give the person injured an opportunity of bringing his action against somebody. But here no action could have been maintained upon these words against the boy. Whereas, if the defendant had named the boy at the time, and repeated truly what he had said to him, the plaintiff would have had his action against the boy. The only question, then, is this, whether the declaration be sustainable. And I agree with the defendant's counsel, that if the words as laid would not, in the ordinary understanding of mankind, bear the meaning imputed to them, the *innuendo* will not help them. In *Peake v. Oldham*, Lord Mansfield lays down the rule that, "where words from their general import appear to have been spoken with a view to defame a party, the court ought not to be industrious in putting a construction upon them different from what they bear in the common acceptance and meaning of them." The argument, then, goes too far, when it is contended that the words must be such as must necessarily bear a criminal import, and no other, in order to maintain an action upon them. For then, if the words had been a direct charge of an unnatural crime by using those very words, it might be argued that no action would lie upon them without some explanation of what was meant by an unnatural crime, as it might be said that all crimes are against the order of nature; and so they are in a general sense. But the true question is, whether, in the ordinary acceptance of the words, any person can reasonably doubt of their signification. No such doubt can, I think, be entertained in this case, and therefore the declaration is good.

LE BLANC, J. It is clear that the pleas cannot be supported upon the cases which have been decided; because a person who reports slanderous words, which he heard from another, must give the name of the person from whom he heard it at the time he reports it; and it is not sufficient to do so for the first time in his plea to an action for those words. Then as to the sufficiency of the declaration, if the words themselves do not convey to all persons who hear them what the sense of the speaker was, I admit that they cannot be extended by an *innuendo*. But nobody can read these words without seeing what they meant to impute against the plaintiff. It is not sufficient to show by argument that the words will admit of some other meaning; but the court must understand them as all mankind would understand them, and we cannot understand them differently in court from what they would do out of court. And it would be impossible for a



number of persons, indifferently assembled, not to agree in the meaning which has been imputed to these words in the declaration.

*Judgment for the plaintiff upon the demurrers to the second, third, and fifth pleas.*<sup>1</sup>

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ROBERTS v. CAMDEN.

IN THE KING'S BENCH, NOVEMBER 25, 1807.

[Reported in 9 East, 93.]

IN an action on the case for slander, the plaintiff, after stating by way of introduction that at the time of the slanderous words spoken he was a practising attorney of the Court of Great Sessions for the county of Flint, and had conducted himself with integrity, &c., declared in the third count that the defendant, intending to injure and aggrieve the plaintiff in his good name, character, &c., and profession, and to cause it to be believed that the plaintiff was guilty of perjury, and that a prosecution for the crime of perjury was about to be commenced against him, afterwards, &c., in a certain discourse, &c., falsely and maliciously, &c., said and published these false, scandalous, and malicious words following, of and concerning the plaintiff, viz.: "He" (meaning the plaintiff) "is under a charge of a prosecution for perjury. G. Williams" (meaning one G. W. an attorney) "had the Attorney-General's directions" (meaning the directions of his Majesty's Attorney-General for the county palatine of Chester) "to prosecute" (meaning to prosecute the plaintiff) "for perjury. By reason whereof the plaintiff was injured and prejudiced in his good name, &c., and profession, and lost great gains which he would otherwise have acquired by his profession of an attorney." There was a fourth count for a written libel.

After a general verdict, with joint damages on the whole declaration, Burrough moved in last Trinity term, in arrest of judgment, and afterwards argued the case, together with Topping, for the defendant; and the Attorney-General and Scarlett were heard against the rule for arresting the judgment. The cases cited for the plaintiff, to show that the words were in themselves actionable, were *Haley v. Stanton*;<sup>2</sup> *Heynes v. Sprot*;<sup>3</sup> *Showell v. Hayman*;<sup>4</sup> *Gainford v. Tuke*.<sup>5</sup> And

<sup>1</sup> *Kennedy v. Gifford*, 19 Wend. 296; *Poturite v. Barrel*, 1 Sid. 220; *Harper v. Delp*, 3 Ind. 225; *Ausman v. Veal*, 10 Ind. 355; *Goodrich v. Woolcott*, 3 Cow. 231; s. c. 5 Cow. 714; *Hays v. Brierly*, 4 Watts, 392, acc.; *Harper v. Delp*, 3 Ind. 225, *contra*. — ED.

<sup>2</sup> *W. Jones*, 299, and *Cro. Car.* 268.

<sup>4</sup> *Cro. Jac.* 154.

<sup>3</sup> *Cro. Jac.* 247.

<sup>5</sup> *Ibid.* 536.









his counsel contended that at any rate, if the third count were bad, the court would not arrest the judgment, but only award a *venire de novo* to have the damages severed by another jury. On the other hand were cited *Holt v. Scholefield*; *Steward v. Bishop*; *Powell v. Wind*; <sup>1</sup> *Bayly v. Churington*; <sup>2</sup> *Weaver v. Cariden*,<sup>3</sup> to show that the words were not actionable, as not conveying any opinion of the speaker upon the truth of the charge. And the *innuendo*, as to the Attorney-General of Chester, was objected to as not warranted by any antecedent *colloquium*. This case stood over for consideration till this term, when

LORD ELLENBOROUGH, C. J., delivered judgment. This was a motion in arrest of judgment in an action for words, in which a general verdict was found, with joint damages, upon the whole of the declaration. One of the counts (the third) which it contained has been argued on the part of the defendant to be bad on two grounds: first, that the words therein stated are not actionable, as not imputing to the plaintiff with sufficient certainty the crime they point at, namely, that of perjury; and, secondly, because as there is no *colloquium* respecting the Attorney-General of Chester, the *innuendo*, stating that "the Attorney-General" meant the Attorney-General for that county, vitiates the count, as being introductive of new matter. But we think that there is nothing in this last objection; for, admitting most clearly that new matter cannot be introduced by an *innuendo*, but that it must be brought upon the record in another way, when necessary to support the action, yet where such new matter is not, as here, necessary to support the action, an *innuendo*, without any *colloquium*, may well be rejected as surplusage, as it can have no effect in enlarging the sense of the words used. If, then, the *innuendo* be struck out of this count, — as for the reason above given we think it may, — the foundation of the second objection is removed. The first objection turns upon the meaning of the words spoken of the plaintiff by the defendant. The words are these: "He is under a charge of a prosecution for perjury. Griffith Williams" (meaning an attorney of that name) "has the Attorney-General's direction" (meaning the Attorney-General of the county palatine of Chester) "to prosecute" (meaning to prosecute the plaintiff) "for perjury." As it has been settled, ever since the case of *Underwood v. Parkes*, that the truth of the words cannot be given in evidence upon not guilty, but must be specially pleaded, the words, not having been so justified, must be assumed to be false; and the words not being accompanied by any qualifying context, nor appearing to be spoken on any warrantable occasion, as in a course of duty, or the like, so as to rebut the malice which is necessarily to be in-

<sup>1</sup> Hob. 305, 327.<sup>2</sup> Cro. Eliz. 279.<sup>3</sup> 4 Rep. 16.

ferred from making a false charge of this kind, provided the charge itself is to be considered as a charge of the crime of perjury, the question amounts simply to this, whether the words amount to such charge; that is, whether they are calculated to convey to the mind of an ordinary hearer an imputation upon the plaintiff of the crime of perjury. The rule which at one time prevailed, that words are to be understood *in mitiori sensu*, has been long ago superseded; and words are now construed by courts as they always ought to have been, in the plain and popular sense in which the rest of the world naturally understand them. What, then, is the plain and popular sense of these words; and what is the imputation meant to be conveyed by a person speaking them untruly of another? They must mean that he was ordered by the Attorney-General to be prosecuted (and it is immaterial for this purpose whether the Attorney-General of the county palatine or of England were meant), either for a perjury which he had committed, or which he had not committed, or which he was supposed only to have committed. In the first sense they are clearly actionable. In the second, they cannot possibly be understood consistently with the context. And if the defendant had used the words in the last sense, the jury might have acquitted him, according to the doctrine in the case of *Oldham v. Peake*, both in the Court of Common Pleas and in this court; in which case, when in the Common Pleas, Mr. Justice Gould laid it down "that what was the defendant's meaning was a fact for the jury to decide upon." And Lord Mansfield afterwards, when that case was brought into this court by error, said: "If (the words had been) shown to be innocently spoken, the jury might have found a verdict for the defendant; but they have put a contrary construction upon the words as laid." And, certainly, if the sense of the defendant in speaking these words had varied from that ascribed to them by the plaintiff, he might, by specially pleading, have shown them not actionable, had he not chosen to have rested his defence merely on the general issue. It appears, therefore, that these words must fairly be understood in the first of these three senses; namely, that he was ordered to be prosecuted for a perjury which he had committed: and so understood, they are unquestionably actionable. These words are not less strong in effect than the words which were held actionable in one of the later cases, that of *Carpenter v. Tarrant*,<sup>1</sup> viz., "Robert Carpenter was in Winchester gaol, and tried for his life, and would have been hanged had it not been for Leggat, for breaking open the granary of farmer A., and stealing his bacon." And without adverting to the long bead-roll of conflicting cases which

<sup>1</sup> Rep. temp. Hardw. 339.











have been cited on both sides in the course of this argument, it is sufficient to say that these words, fairly and naturally construed, appear to us to have been meant, and to be calculated to convey, the imputation of perjury actually committed by the person of whom they are spoken, and that, therefore, the rule *nisi* for arresting the judgment must be discharged.

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### THOMPSON v. BERNARD.

AT NISI PRIUS, CORAM LORD ELLENBOROUGH, C. J., DECEMBER 9, 1807.

[*Reported in 1 Campbell, 48.*]

CASE for slander. It appeared that the defendant had used the following words, which were laid in the declaration: "Thompson is a damned thief, and so was his father before him, and I can prove it;" but that he added, "Thompson received the earnings of the ship, and ought to pay the wages." The witness to whom these words were addressed had been master of a ship belonging to a person deceased, who had left the defendant his executor, and at the time was applying to him for payment of his wages.

LORD ELLENBOROUGH directed a nonsuit, observing that the word "thief" was used without any intention in the defendant to impute felony to the plaintiff, which must appear to support the declaration.<sup>1</sup>

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### FORD v. PRIMROSE.

IN THE KING'S BENCH, NOVEMBER 9, 1824.

[*Reported in 5 Dowling & Ryland, 287.*]

SLANDER. The declaration alleged that the defendant, intending it to be believed that the plaintiff had been guilty of murder or manslaughter, in a *colloquium* of and concerning the death of plaintiff's wife, used these words: "I think the present business ought to have the most rigid inquiry, for he" (meaning the plaintiff) "murdered his first wife, that is, he administered, improperly, medicines to her for a certain complaint, which was the cause of her death." On not guilty, the

<sup>1</sup> Smith v. Carey, 3 Camp. 461; Robertson v. Lea, 1 Stew. 141; Abrams v. Smith, 8 Blackf. 95; Thompson v. Grimes, 5 Ind. 385; Hotchkiss v. Olmstead, 37 Ind. 74; Hawn v. Smith, 4 B. Monr. 385; Brown v. Piner, 6 Bush, 518; Allen v. Hillman, 12 Pick. 101; Colbert v. Caldwell, 3 Grant, 181. See Upham v. Dickinson, 50 Ill. 97; Taylor v. Short, 40 Ind. 506, acc. — ED.

jury, at the last assizes for the county of Suffolk, before Gazelee, J., found a verdict for the plaintiff, damages £20.

*Storks* now moved to arrest the judgment, for that these words, taken together, were not actionable, inasmuch as they did not import any crime punishable by law. The word "murdered" is fully explained by what follows, which shows that the death was caused by the administration of improper medicines for a certain complaint, whereof the woman died. Now, if medicines were improperly administered, either from accident or ignorance, and death ensued, it would be neither murder nor manslaughter. The words declared upon, therefore, do not import any offence in law, and consequently are not actionable.

ABBOTT, C. J. Admitting it to be doubtful whether these words import the charge of a crime upon the plaintiff, that doubt has been removed by the verdict; for the declaration alleges that the defendant uttered these words with an intention to cause it to be believed that the plaintiff was guilty of murder or manslaughter, and if the jury were of opinion that they were uttered with that intention, we cannot say that the plaintiff is not entitled to a verdict. But I cannot say that these words may not, in reasonable construction, import a charge of murder or manslaughter, especially after the finding of the jury.

BAYLEY, J. I take it that, if a man, by the improper administration of medicines to another, cause his death, that would be manslaughter. And if he administers medicines with an intent to produce death, it would be murder. I think the words declared upon import at least a charge of manslaughter.

HOLROYD and LITTLEDALE, JJ., were of the same opinion.

*Rule refused.*<sup>1</sup>

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## TOMLINSON v. BRITTLEBANK.

IN THE KING'S BENCH, APRIL 19, 1833.

[Reported in 4 *Barnewall & Adolphus*, 630.]

CASE for words. The declaration contained several counts for words reflecting on the plaintiff as an attorney, but the last count merely stated that, in a certain discourse which the defendant had of and concerning the plaintiff in the presence, &c., he, the defendant, contriving and intending to injure the plaintiff in his good name, fame, and credit, falsely and maliciously spoke and published of and concerning him the false, scandalous, malicious, and defamatory words following, viz., "He

<sup>1</sup> *Taylor v. Casey*, 1 Minor, 258; *Hays v. Hays*, 1 Humph. 402, acc. See *Edsall v. Russell*, 4 M. & Gr. 1090; *Carroll v. White*, 33 Barb. 615. — ED.











robbed John White;" thereby meaning that the said plaintiff had been and was guilty of an offence punishable by law. No special damage was laid applicable to this count. Plea: the general issue. At the trial of this cause at the last assizes for Stafford, a verdict was taken for the plaintiff upon the whole declaration.

*R. V. Richards* now moved for a rule to show cause why the judgment should not be arrested. The words in this count are not actionable without special damage. It is true that in 7 & 8 Geo. IV. c. 29, § 6,<sup>1</sup> the word "rob" is used to signify the commission of a felony; but the word is of equivocal import, like "forsworn," which by itself is not an actionable expression. There is nothing here to connect the word "rob" with any transaction to which the statute applies; it is not said that the plaintiff robbed White of any chattel or specific thing. In Com. Dig., Action on the Case for Defamation, D, 16, robbery is mentioned as a word of slander; but the instance given is where it was spoken of a clergyman in his profession, "yonder is Dr. A. robbing the church." In Com. Dig., under the same title, F, 2, it is laid down that to say of a man, "he poisoned A.," without averring that A. is dead, is not sufficiently certain to be actionable (*semble*), and in F, 4, some equally strong cases are put with respect to stealing. [PARKE, J. The cases under that head in Com. Dig., as to taking words *in mitiori sensu*, have been very much criticised, as going into too great minuteness. The reason assigned is, that when those cases occurred, vexatious actions for words were too frequent, and the courts resorted to subtleties to get rid of them.<sup>2</sup> When it is said that a man robbed another, does not it imply that he took something from him?] There ought at least to be some explanation by the context to give words the unfavorable sense here contended for. [PARKE, J. That is where the sense to be assigned is not the ordinary one.] It is for the plaintiff to establish the sense which he relies upon. An *innuendo* cannot enlarge it. In *Holt v. Scholefield*, where the words were, "T. H. has forsworn himself," an *innuendo* was added, meaning that the plaintiff had committed wilful and corrupt perjury; but the count was held not maintainable. If the present count is good, that also might have been supported.

DENMAN, C. J. Almost any words may be used in more than one sense. But the word "to rob" gives a sufficient description of an offence punishable by law in the very terms of the statute 7 & 8 Geo. IV.

<sup>1</sup> It enacts, "that if any person shall rob any other person of any chattel, money, or valuable security, every such offender, being convicted thereof, shall suffer death as a felon."

<sup>2</sup> See *Button v. Heyward*, 8 Mod. 24.

c. 29. It has but one legal sense. "Forsworn" is applicable not only to perjuries punishable at law, but also to offences of the same description which incur no temporal punishment. I think, therefore, that the count is sufficient.

LITLEDALE, J. I do not think the term "to rob" necessarily means taking goods from another by force in the sense of the statute, and I very much doubt whether the count is good; but, as my brothers are of a different opinion, there will be no rule.

PARKE, J. I think the *prima facie* import of the words is, that the plaintiff has done that which in ordinary parlance is called robbing, and is described in this count as a punishable offence. If they were used in any other sense, it was for the defendant to show it.

*Rule refused.*<sup>1</sup>

## FOWLER v. DOWDNEY.

AT NISI PRIUS, CORAM LORD DENMAN, C. J., MARCH 2, 1838.

[Reported in 2 Moody & Robinson, 119.]

SLANDER, for saying of the plaintiff, "He is a returned convict." The declaration averred, as special damage, the loss of a customer to whom the words were spoken, the plaintiff being a tradesman. The proof of the special damage failed, and thereupon

*Erle*, for the defendant, contended that the words were not actionable in themselves, inasmuch as they imputed no present liability to punishment; for, conceding that an offence, for which transportation

<sup>1</sup> Thimblethorp's Case, Moore, 418; Anon., Mar. 7; Morgan v. Williams, 1 Stra. 142; Penfold v. Westcote, 2 B. & P. N. R. 335; Slowman v. Dutton, 10 Bing. 402; Rowcliff v. Edmonds, 7 M. & W. 12; Rutherford v. Moore, 1 Cranch C. C. 388; Williams v. Miner, 18 Conn. 464; Little v. Barlow, 26 Ga. 423; Upham v. Dickinson, 50 Ill. 97; Becket v. Sterret, 4 Blackf. 499; Jones v. Chapman, 5 Blackf. 88; Alley v. Neely, 5 Blackf. 201; Reynolds v. Ross, 42 Ind. 387; Pierson v. Steortz, Morris, 136; Parker v. Lewis, 2 Greene, 311; DeMoss v. Haycock, 15 Iowa, 149; Gill v. Bright, 6 Monr. 130; McNamara v. Shannon, 8 Bush, 557; Wheatley v. Wallis, 3 Har. & J. 1; Bonner v. Boyd, 3 Har. & J. 278; Long v. Eakle, 4 Md. 454; Wonson v. Sayward, 13 Pick. 402; St. Martin v. Desnoyer, 1 Minn. 156; Simmons v. Holster, 13 Minn. 249; Fallensten v. Boothe, 13 Mo. 427; Pennington v. Meeks, 46 Mo. 217; Robinson v. Keyser, 22 N. H. 323; Laine v. Wells, 7 Wend. 175; Nash v. Benedict, 25 Wend. 645; Van Akin v. Caler, 48 Barb. 58; Dudley v. Robinson, 2 Ired. 141; Dougherty v. Miller, Wright (Ohio), 36; Cheadle v. Buell, 6 Ohio, 67; Bash v. Sommer, 20 Pa. 159; Hogg v. Wilson, 1 N. & McC. 216; Stokes v. Stuckey, 1 McCord, 562; Fisher v. Rotereau, 2 McCord, 189; Hugley v. Hugley, 2 Bail. 592; Yarborough v. Tate, 14 Tex. 483; Sabin v. Angell, 46 Vt. 740; Rogers v. Henry, 82 Wis. 327, acc.; Palmer v. Edwards, Cook's Pr. Cas. 160, *contra*. — ED.









was the punishment, was imputed, the words imply that the party had already suffered that punishment.

LORD DENMAN, C. J. My opinion is that these words are actionable, because they impute to the plaintiff that he has been guilty of some offence for which parties are liable to be transported. That is, I think, the plain meaning of the words as set out in the declaration; they import, to be sure, that the punishment has been suffered, but still the obloquy remains.

*Verdict for the plaintiff. Damages, 1s.<sup>1</sup>*

## HANKINSON v. BILBY.

IN THE EXCHEQUER, JANUARY 28, 1847.

[Reported in 16 Meeson & Welsby, 442.]

CASE. The declaration stated that the plaintiff, before and at the committing of the grievances, was a gardener, and thereby acquired great gains and earned his livelihood; and that the defendant, well knowing, &c., on, &c., in a discourse which he had of and concerning the plaintiff, and of and concerning him as such gardener, in the presence and hearing of divers subjects, then in the presence and hearing of the said subjects, falsely and maliciously spoke and published of and concerning the plaintiff, and of and concerning him as such gardener, the false, scandalous, malicious, and defamatory words following, that is to say: "You" (meaning the plaintiff) "are a thief, and a bloody thief. You" (meaning the plaintiff) "get your" (meaning the plaintiff's) "living by it. You" (meaning the plaintiff) "have robbed Mr. Lake of £30, and would have robbed him of more, only you" (meaning the plaintiff) "were afraid. I" (meaning himself, said defendant) "did mean what I said: be off, I don't want any bloody thieves" (meaning the plaintiff) "here. You" (meaning the plaintiff) "know you" (meaning the plaintiff) "robbed Mr. Lake of £30." By means of the speaking and publishing which words divers persons have believed the plaintiff to be a person guilty of the offences and misconduct imputed to him, &c. Pleas: Not guilty; and other pleas, which became immaterial. At the trial,

<sup>1</sup> Gainford v. Tuke, Cro. Jac. 536; Boston v. Tatam, Cro. Jac. 623; Beaver v. Hides, *supra*, p.—; Stewart v. Howe, 17 Ill. 71; Wiley v. Campbell, 5 Monr. 396; Krebs v. Oliver, 12 Gray, 239; Johnson v. Dicken, 25 Mo. 580; Van Ankin v. Westfall, 14 Johns. 233; Ship v. McCraw, 3 Murphy, 463; Smith v. Stewart, 5 Pa. 372; Beck v. Stitzel, 21 Pa. 524; Poe v. Grever, 3 Sneed (Tenn.), 664, acc. Conf. Carpenter v. Tarrant, C. T. Hardw. 339; French v. Creath, Breese, 12; Barclay v. Thompson, 2 P. & W. 148.—ED.



before Rolfe, B., it appeared that the words were uttered by the defendant, a toll collector, to the plaintiff, as he passed the Kingsland turnpike-gate, in the presence of several persons as well as the witness. The nature of the previous conversation between the plaintiff and defendant did not appear. The learned Baron told the jury that it was immaterial whether the defendant intended to convey a charge of felony against the plaintiff by the words used, the question being, whether the by-standers would understand that charge to be conveyed by them. Verdict for the plaintiff for £5.

*Humfrey* now moved for a new trial, on the ground of misdirection. No special damage being laid, it was necessary to show the words to be actionable in themselves. The witness called by the plaintiff to prove the words was purposely selected, he not having heard the previous conversation between the plaintiff and defendant. Mr. Starkie, in his work on Libel (2d ed.), vol. i. p. 44, says: "It is incumbent on the party who complains that he has suffered from an imputation of crime, to show with certainty the injurious nature of the communication. In order to establish this point, two circumstances are necessary: first, that the words or signs used should, either of themselves or by reference to circumstances, be capable of the offensive meaning attributed to them; secondly, that the defendant did in fact use them in that sense." He afterwards says (id. p. 46), "It is now the settled rule of law that judges and juries shall understand words in that sense which the author intended to convey to the minds of the hearers, as evidenced by the whole circumstances of the case." [PARKE, B. The drift of Mr. Starkie's remarks is to show that the effect of the words used, and not the meaning of the party in uttering them, is the test of their being actionable or not; that is, first ascertain the meaning of the words themselves, and then give them the effect any reasonable by-stander would affix to them. A man must be taken to mean what he utters. If he use words imputing felony, he will be taken to have used them maliciously, unless he gives some sufficient excuse for using them, as in giving the character of a servant on request, making a charge to a constable, &c. My brother Rolfe thought that the question was, what was the effect on the by-standers of the words used, not what the defendant secretly intended in his own mind.] In *Tempest v. Chambers*, the declaration alleged that the defendant had charged the plaintiff before a magistrate with having feloniously taken away the defendant's shutters. The written information was for unlawfully taking them and converting them to his own use, viz., a mere trespass. The defendant, having got the warrant, said to the plaintiff's agent, "I have got a warrant for *Tempest*. I will advertise a reward to apprehend him. I shall transport him for felony." Lord Ellenborough said, "The









case is reduced to the speaking the words. The defendant probably thought that, as he had obtained a warrant, the plaintiff had been guilty of felony. The warrant was improperly granted. This is different from the case of words spoken without explanation to a stranger, since they were spoken to one who had been employed as the plaintiff's agent, and arose out of the situation of the parties. He put his own sense on the warrant; I do not think he meant more. If you are of opinion that he meant substantively to impute a charge of felony, the plaintiff will be entitled to a verdict, but not otherwise." [ALDERSON, B. In that case, had there been by-standers parties to or hearers of the conversation, who did not know the whole of the matter to which the words referred, as the witness from his connection with the plaintiff did, the intent of the defendant in using the words would have been material. In this case, had there been no by-standers who could understand the words as imputing felony, or who knew all about the affair respecting which they were uttered, the judge's direction would have been wrong, for it would then be *damnum absque injuria*, the *injuria* being the having no lawful occasion to impute felony. PARKE, B. The witness appears to have been well acquainted with the affair to which the words related. If the by-standers were equally cognizant of it, the defendant would have been entitled to a verdict; but here the only question is, whether the private intention of a man who utters injurious words is material, if by-standers may fairly understand them in a sense and manner injurious to the party to whom they relate, *e.g.* that he was a felon. Here no occasion appears for uttering the words at all, so that the defendant is altogether a wrong-doer. But had he, in his defence, showed a lawful occasion to speak the words he did, then his private intention in uttering them might be material. For if the communication was privileged, his motive in making it would appear. ALDERSON, B. In order to make a communication privileged, the occasion must justify the uttering of actionable words.]

Some doubt being suggested as to the facts proved, the court conferred with Rolfe, B.; and the next day,

POLLOCK, C. B., said, we find from my brother Rolfe that there were several by-standers who not only might but must have heard the expressions which form the subject of this action. That disposes of the case as to the matter of law. Words uttered must be construed in the sense which hearers of common and reasonable understanding would ascribe to them, even though particular individuals better informed on the matter alluded to might form a different judgment on the subject.

*Rule refused.*<sup>1</sup>

<sup>1</sup> Phillips v. Barber, 7 Wend. 439, acc. — ED.

## BARNETT v. ALLEN.

IN THE EXCHEQUER, MAY 29, 1858.

[Reported in 3 Hurlstone &amp; Norman, 376.]

SLANDER. The declaration stated that the defendant, contriving to injure the plaintiff, falsely and maliciously spoke of the plaintiff the words following: "I am surprised Mr. Reynolds should allow a black-leg" (meaning the plaintiff) "in this room" (meaning that the plaintiff obtained his living by dishonest gambling, and was a professed gamester and a fraudulent gamester, &c.).

Plea: Not guilty. Whereupon issue was joined.

At the trial before Erle, J., at the last spring assizes for the county of Kent, it appeared that the plaintiff and the defendant, who were tradesmen at Woolwich, had been present at a public-house called The Edinburgh Castle, kept by one Reynolds, where there had been a raffle, in which both the plaintiff and the defendant had taken part. At supper, after the raffle, the defendant, referring to the plaintiff, said: "I am surprised at Mr. Reynolds allowing a blackleg in this room." A witness named Rice was asked what he understood by "blackleg." The question was objected to by the defendant's counsel, but allowed by the learned judge. The witness said, "I understood blackleg to mean a person in the habit of cheating at a particular game at cards." The learned judge told the jury that if the words used were meant to imply that the defendant was a gambler, and nothing more, the action was not maintainable; but that if they imputed to the plaintiff that he was a cheating gambler, they would find for the plaintiff. The jury having found a verdict for the plaintiff, leave was reserved to the defendant to move to enter a nonsuit.

*Shee*, Serjt., in Easter term, obtained a rule *nisi* accordingly, or for a new trial, on the ground that the words were not actionable, and that the evidence of the meaning of the word "blackleg," which was admitted by the learned judge, was not admissible, and did not support the *innuendo*; against which

*Edwin James* and *Doyle* now showed cause. By the 8 & 9 Vict. c. 109, § 17, persons cheating at play are to be deemed guilty of obtaining money by false pretences. Looking at the circumstances under which the words were spoken, and the fact that the parties had just been gambling, it cannot be supposed that the word was used in the sense that the plaintiff was a gambler simply. There can be no doubt that the intention was to charge him with being a cheating gambler. In 1 Hawk. P. C. book 1, c. 71, § 1, it is said that playing with false











dice is indictable as a cheat at common law.<sup>1</sup> There was evidence that the word was understood as charging fraudulent gaming, and such evidence was properly admitted. [MARTIN, B. Suppose the plaintiff was called by some slang term, such as "cracksman," it could hardly be said that evidence of the sense in which the word was used would not be admissible.] They also referred to *O'Brien v. Bryant*.<sup>2</sup>

*Joyce*, in support of the rule. The first question is, whether the *innuendo* was proved. The words not being actionable in themselves, an *innuendo* was necessary. The court cannot infer that an indictable offence was intended, because the expression is ambiguous. *Day v. Robinson*.<sup>3</sup> In such a case, section 61 of the Common Law Procedure Act, 1852, does not render an *innuendo* unnecessary. Now, assuming the *innuendo* to be proved, no indictable offence is charged by it. It is consistent with it that the plaintiff may have obtained a living by cheating as a gambler abroad. It is therefore not actionable. *Sweetapple v. Jesse*.<sup>4</sup> [MARTIN, B. That case depends upon the old rules of pleading.] There may be dishonorable gaming, in respect of which a man may be called a blackleg, which is not fraudulent gaming, or punishable otherwise than by public opinion, as if an experienced and skilled gambler, "a rook," persuades an inexperienced youth, "a pigeon," to play with him, and then plucks him.

POLLOCK, C. B. I am of opinion that this rule must be absolute. The question turns on whether it is actionable to call a man a "blackleg," without proving special damage. I think it is not. No evidence was given at the trial in proof of the meaning of the word as alleged in the declaration, even if such evidence was admissible, which I think it was not. The word "blackleg" has been used long enough to be understood, not only by experts in slang, but by the public at large, and therefore it was for the judge to expound its meaning. I have always understood the word "blackleg" to mean a person who gets his living by frequenting racecourses and places where games of chance are played; getting the best odds and giving the least he can; but not necessarily cheating. That is not indictable either by statute or at common law. It is, therefore, not more actionable to call a man a "blackleg" than it is to call him a "villain," a "cheat," a "swindler," or any other opprobrious term not necessarily imputing the commission of a particular crime. There are many expressions which, if applied to a man, would place him in a most odious light; but the law has judged that such words of heat ought not to be the subject of an action, unless they have a tendency to expose the person of whom they are spoken

<sup>1</sup> On this point they cited also 2 Roll Abr. 78 (H.)

<sup>2</sup> 16 M. & W. 168.

<sup>3</sup> 1 A. & E. 554.

<sup>4</sup> 5 B. & Ad. 27.

to peril; or unless they amount to slander of title, or slander in respect of his trade or profession. Except in these three cases, with respect to ordinary persons, words of this kind are not actionable without special damage. According to the definition in Webster's Dictionary, the word "blackleg" may be applied to a notorious gambler or cheat. To support the declaration, the meaning must be shown to be a "gambling cheat," or "cheating gambler." Here there was no evidence that the word was used in a sense different from that in which it was ordinarily understood; though I doubt whether any evidence ought to change the meaning of a word so as to give it a worse sense than it has in its ordinary acceptation, unless it refers to a particular transaction. Here the evidence was that the defendant simply called the plaintiff a "blackleg," without reference to any other matter. The witness Rice was asked what he understood by the word "blackleg." That was not the proper question. If an expert is called in to explain a slang term, the proper question is, What is the general meaning of the term amongst those who are in the habit of employing it? Upon the general principle that a mere term of reproach is not actionable, I think that this action was not maintainable.

MARTIN, B. I regret that any difference should exist in the court on so trifling a matter. I always understood the rule to be, that words are actionable if they impute to the person of whom they are spoken an indictable offence, either on a particular occasion or habitually. By the statute 8 & 9 Vict. c. 109, cheating at cards is indictable; and the question is, Did or did not the defendant use the word with intent to convey to the minds of the persons present the imputation that the plaintiff had habitually by fraud and malpractice won money? I should have so understood them; and that such was the defendant's meaning was proved by the evidence. The witness who was called said he considered the word "blackleg" to mean a person who plays at cards, and cheats; it was therefore a question for the jury whether the defendant meant to impute to the plaintiff that he had been guilty of an offence for which he was liable to be indicted under the statute.

BRAMWELL, B. I agree with my brother Martin. I construe the word "blackleg" in the same sense in which he does. In considering questions of this kind, we have to ascertain, not exactly the sense in which words are understood by the hearers, but in what sense they would be reasonably understood. A person is responsible for the natural meaning of words uttered by him. If a word is properly an English word, the judge must interpret it. If it be slang, witnesses may be called to show in what sense it is understood. I doubt whether the word "blackleg" is English, or whether it is slang. If it is English,











then I understand it as my brother Martin does ; if it is slang, an interpretation has been put upon it by the evidence. I do not agree with the Lord Chief Baron in thinking that there was no evidence of its meaning. If it is English, the *innuendo* was unnecessary ; if it is slang, the *innuendo* was proved ; that is, the defendant uttered language charging the plaintiff with being a fraudulent gamester. I entertained some little doubt whether, to constitute a cause of action, it was not necessary that the charge should be specific ; but on referring to Comyns's Digest, Action on the Case for Defamation, D, 4, I find that it is actionable if the defendant charge the plaintiff "with felony generally, as, he is a thief."

WATSON, B. I think that the rule ought to be absolute. This is an action for slander, not of a person in his trade, but simply imputing to the plaintiff that he was a "blackleg," and no special damage was proved. Under these circumstances it must be shown that the slander imputes a charge upon which criminal proceedings might be taken. The word by itself cannot impute that the person to whom it is applied is liable to punishment. It imputes no crime. The word is a modern one, and does not convey any precise notion to my mind, and it is clear that it did not convey any definite idea to the mind of the pleader who drew the declaration. It may be actionable to say of a person that he is a "fraudulent gamester," but the *innuendo* was not proved here. The witness was asked, "What do you understand by the word 'blackleg'?" but that was not a proper question. In an action for slander in a foreign language, a witness might be asked what he understood by the foreign word used. But suppose a person called another "a cheat," a witness could not be asked what was meant by the word "cheat" on a particular occasion. Certain slang terms, such as "lame duck," have obtained distinct and precise meanings as connected with a man's trade, and such meaning might be proved. In the case of *Daines v. Hartley*,<sup>1</sup> it was held that, unless a foundation is laid by showing that something had previously passed which gave a peculiar character and meaning to some word, the question cannot be put to a witness, "What did you understand by it?" It is necessary to show that there was something to prevent the word from conveying the meaning which it ordinarily would convey. Here I think that no such foundation was laid for the question.

The court being equally divided, the rule was discharged in order that the defendant might appeal.<sup>2</sup>

<sup>1</sup> 8 Exch. 200.

<sup>2</sup> Conf. *Carter v. Andrews*, 16 Pick. 1 ; *Hays v. Mitchell*, 7 Blackf. 117 ; *Joralemon v. Pomeroy*, 2 Zab. 271 ; *Walton v. Singleton*, 7 Serg. & R. 449 ; *O'Brien v. Clement*, 16 M. & W. 159 ; *O'Brien v. Bryant*, 16 M. & W. 168.

## M'CABE v. FOOT.

IN THE QUEEN'S BENCH, IRELAND, APRIL 25, 1866.

[Reported in 15 *Law Times Reports, New Series*, 115.]

**DEMURRER.** The first paragraph of the summons and plaint complained that the defendant falsely and maliciously spoke and published of the plaintiff the words following, that is to say: "I" (meaning the defendant) "heard that Daniel M'Cabe" (meaning the plaintiff) "and Timothy Callaghan drew the river Blackwater with a net at night;" meaning thereby, and giving and causing it to be understood, that the plaintiff, after the making and passing of the Salmon Fishery (Ireland) Act, 1863, had used a net, not being a landing net, for the capture of salmon and trout in the fresh-water portion of the river Blackwater, in the county of Cork, as defined by the commissioners under the said act, between the hours of eight o'clock in the evening and six o'clock in the morning, and not within the limits of a several fishery next above the tidal flow, and held under grant or charter, or by immemorial usage.

The second, third, and fourth paragraphs all complained of the same words, alleging that they imputed the same offence of night-fishing with a net other than a landing net, but varying the reasons for the non-existence of the right of fishing according to different sections of the Salmon Fishery Acts of 1863 and 1842.

To these several paragraphs of the summons and plaint the defendant demurred, saying that the paragraphs respectively did not disclose any cause of action good in substance, for that the words therein alleged to be spoken by the defendant were not, nor were any of them, slanderous, inasmuch as they did not impute to the plaintiff such a criminal offence as was punishable in the manner required by law.

*James Murphy* (with him *Jellett*, Q. C.), in support of the demurrer. To make the imputation of an offence slanderous *per se*, the offence imputed must be one which would subject the party to some corporal punishment. The penalty consequent upon the acts here imputed is merely pecuniary. No case will be found in which slander has been held to lie for imputing an offence for which a fine would be the penalty. *Lewknor v. Crutchley*; <sup>1</sup> *Turner v. Ogden*; *Onslow v. Horne*; *Whitacre v. Hillidell*; <sup>2</sup> *Holt v. Scofield*; *Feise v. Linder*; <sup>3</sup> *Poland v. Mason*; <sup>4</sup> *1 Starkie on Slander*, 43.

*W. M. Johnson* and *Clarke*, Q. C., contra. The imputation here is

<sup>1</sup> Cr. Ch. 140.<sup>3</sup> 8 Bos. & Pul. 372.<sup>2</sup> Alleyn, 11.<sup>4</sup> Hob. 305.









of night poaching, and is one which would tend to degrade a person in the eyes of society. The offence is punishable by fine and forfeiture of the instruments used in committing it. Stat. 5 & 6 Vict. c. 106, §94; Cockaine v. Witnam;<sup>1</sup> Tibbott v. Haynes.<sup>2</sup> Penalties are every day being substituted for punishments. Could it be said that the imputation of such crimes as arson, or perjury, or forgery, would not support an action of slander?

Jellett, in reply. If these words are held slanderous *per se*, then the imputation of the breach of various municipal regulations for which fines have been imposed by statutes must also be held actionable *per se*. Yet, can it be said that the imputations in those cases are imputations of infamous offences?

O'BRIEN, J. It certainly is not desirable to extend the class of cases in which actions of slander may be brought; and the last argument of Mr. Jellett is strong to show that the court should not do so in this instance. It might as well be said that an imputation on a man that he did not scour a ditch lying along a public road was slanderous *per se*. The offence charged here is not a criminal offence in the sense which is required for an action of slander.

FITZGERALD, J. An action does not, in the absence of special damage, lie for slander, unless the words carry the imputation of an offence punishable by corporal punishment in a temporal court; and I should say that I consider that that embraces a degrading punishment.

LEFROY, C. J., concurred.

*Judgment for defendant.*<sup>3</sup>

<sup>1</sup> Cro. Eliz. 49.

<sup>2</sup> Cro. Eliz. 191.

<sup>3</sup> Walden v. Mitchell, 2 Vent. 265, acc.

In Hawes's Case, March, 113 (Speaking against common prayer); Heake v. Moulton, Yelv. 90; Scoble v. Lee, 2 Show. 32 (Regrating); Dudley v. Horn, 21 Ala. 379 (Beating wife so that she miscarried); Elliott v. Ailsberry, 2 Bibb, 473 (Fornication); M'Gee v. Wilson, Litt. S. C. 187 (Unchastity); Buck v. Hersey, 81 Me. 558 (Drunk-enness); Wagaman v. Byers, 17 Md. 183 (Adultery); Birch v. Benton, 26 Mo. 153 (Whipping one's wife); Speaker v. McKenzie, 26 Mo. 255 (Whipping one's mother); Billings v. Wing, 7 Vt. 439 ("He snaked his mother out of doors by the hair of her head; it was the day before she died"), the words uttered were held not to give a right of action, since they imputed crimes punishable only by fine, or by imprisonment merely as a consequence of the non-payment of the fine.

In Shipp v. McCraw, 3 Murph. 463; Brady v. Wilson, 4 Hawks. 94; Skinner v. White, 1 Dev. & Bat. 471; Wall v. Hoskins, 5 Ired. 177; Wilson v. Tatum, 8 Jones (N. Ca.), 300, it is held that the punishment must be infamous; but the rule laid down in Brooker v. Coffin, *infra*, p. 689, is disapproved. — ED.



## VAN RENSSELAER v. DOLE.

SUPREME COURT OF JUDICATURE, NEW YORK, APRIL, 1800.

[Reported in 1 *Johnson's Cases*, 279.]

THIS was an action of slander. The declaration charged the defendant with speaking of the plaintiff and others the following words: "John Keating is as damned a rascal as ever lived, and all who joined his party and the procession of the 4th July" (meaning the said John Van Rensselaer and the party and procession in which the said John Keating acted as captain on the said 4th day of July) "are a set of blackhearted highwaymen, robbers, and murderers." The words were differently charged, with some additional expressions, in the other counts, but were in substance the same. Plea: the general issue.

The cause was tried before Mr. Justice Benson, at the last March sittings in the city of Albany. The words charged were proved to have been spoken by the defendant.

On the part of the defendant it appeared, that, on the day previous to the speaking of the words, there had been a public procession to a church in Lansingburgh, where the parties resided; that Keating commanded an artillery company, which formed part of the procession, attended with music; that a Mr. Bird claimed one of the instruments of music, a bass viol, and went to the church to demand, or take it, but it was refused to be delivered, and retained by force; that upon this an affray ensued, in which Mr. Bird received a dangerous wound.

It was proved that the conversation in which the words were spoken was understood by the witnesses to relate to the transactions of the preceding day, and that the terms, "highwaymen, robbers, and murderers," were used in reference to the treatment of Mr. Bird in withholding the bass viol, and in stabbing him.

The judge was of opinion that the words being spoken in relation to the transactions of the preceding day, and so understood, were thereby explained, and on that account not actionable. The jury, nevertheless, found a verdict for the plaintiff for fifty dollars damages and six cents costs.

The defendant at this term moved for a new trial, on the ground that the verdict was contrary to law and the evidence.

*Woodworth*, for the plaintiff. *Van Vechten*, for the defendant.

*Per Curiam*. We agree in opinion with the judge at the trial. The words spoken by the defendant were clearly understood to apply to the transactions of the preceding day, and these were known not to amount to the charge which the words would otherwise import. Let the ver-









dict, therefore, be set aside; and, there being no question upon the evidence, the finding of the jury must be considered as contrary to law, and it is therefore ordered that the costs abide the event of the suit.

*Rule granted.*<sup>1</sup>

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### HOPKINS v. BEEDLE.

SUPREME COURT OF JUDICATURE, NEW YORK, NOVEMBER, 1803.

[Reported in 1 *Caines*, 347.]

THIS was an action for words spoken of the plaintiff in the discharge of his duty as an overseer of highways, in the county of Cayuga.

In the first count the charge was for saying, "You have sworn to a lie, and I will prove it;" in the second, "You have sworn to a lie;" in the third, "You have perjured yourself as one of the overseers of the town of Washington, and I can prove it."

The jury having found generally for the plaintiff, a motion was now made by the defendant for an arrest of judgment on the following grounds:—

1. That the words in the first and second counts were not in themselves actionable, and no special damage was alleged.

2. That it was not alleged in the first and second counts that the lie, declared by the defendant to have been sworn to by the plaintiff, had been sworn to, or any oath had been taken by the plaintiff, touching the same, in any court of justice, or before any person having competent authority to administer an oath or oaths by the laws of this State.

3. That the charge of perjury, alleged in the third count to have been imputed by the defendant to the plaintiff, cannot, by the laws of this State, amount to a charge of perjury, the same necessarily being a charge of violating the promissory oath taken by the plaintiff as one of the overseers of highways of the town of Washington, in the county of Cayuga aforesaid.

4. That the verdict was general, and that the first and second counts being obviously vicious, judgment could not be rendered for the said plaintiff, for which causes, and for others apparent on the declaration, the defendant insisted the judgment ought to be arrested.

<sup>1</sup> *Williams v. Cawley*, 18 Ala. 206; *Wright v. Lindsay*, 20 Ala. 428; *Parmer v. Anderson*, 33 Ala. 78; *Ayers v. Grider*, 15 Ill. 37; *Carmichael v. Shiel*, 21 Ind. 66; *McCaleb v. Smith*, 22 Iowa, 242; *Desmond v. Brown*, 33 Iowa, 13; *Brite v. Gill*, 2 Monr. 65; *Gill v. Brigt*, 6 Monr. 130; *Dunnell v. Fiske*, 11 Metc. 551; *Norton v. Ladd*, 5 N. H. 203; *Quinn v. O'Gara*, 2 E. D. Smith, 388; *Perry v. Man*, 1 R. I. 263; *Shecut v. M'Dowell*, 3 Brev. 38, acc. See *Pegram v. Styron*, 1 Bail. 595. See also *Torbitt v. Clare*, 9 I. L. R. 86.—ED.

The case being submitted without argument, the opinion of the court was now delivered by

KENT, J. This is a motion in arrest of judgment. The verdict was general. It is urged, on the part of the defendant, that the words in the first and second counts are not actionable, and that it is not alleged that any oath was taken by the plaintiff before any person competent to administer it. It is further urged, that the charge in the third count relates only to the promissory oath of office, for which an indictment for perjury will not lie.

We are of opinion that the objection to the first and second counts is well taken. Swearing to a lie does not necessarily imply that the party has, in judgment of law, perjured himself. It may mean that he has sworn to a falsehood, without being conscious at the time that it was a falsehood. Actionable words are those that convey the charge of perjury in a clear, unequivocal manner, and which admit of no uncertainty. The charge is defective in not stating any court, or competent officer before whom the plaintiff swore. It may mean extrajudicial swearing, and therefore it is held that a charge that one is forsworn is not actionable, because it shall not be intended in a case where perjury may be committed. On the other hand, a charge that one is perjured, is actionable, for that implies the direct legal crime.

With respect to the third count, we are of opinion that it is sufficient to sustain an action; but as the verdict is general, the judgment must be arrested; the plaintiff, however, on application, might have been entitled to a *venire de novo*, on payment of costs.

*Judgment arrested.*<sup>1</sup>

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## STAFFORD v. GREEN.

SUPREME COURT OF JUDICATURE, NEW YORK, AUGUST, 1806.

[Reported in 1 Johnson, 505.]

FOOT moved in arrest of judgment in this cause, which was an action of slander. There were several counts in the declaration, in one of

<sup>1</sup> Carlock v. Spencer, 7 Ark. 12; M'Gough v. Rhodes, 12 Ark. 625; Blair v. Sharp, Breese, 11; Roella v. Follow, 7 Blackf. 377; Shiloub v. Ammerman, 7 Ind. 347; Watson v. Hampton, 2 Bibb, 319; Martin v. Mellon, 4 Bibb, 99; Beswick v. Chappel, 8 B. Monr. 486; Small v. Clewley, 60 Me. 262; Sheely v. Biggs, 2 H. & J. 363; Palmer v. Hunter, 8 Mo. 512; Harris v. Woody, 9 Mo. 113; McManus v. Jackson, 28 Mo. 56; Vaughan v. Havens, 8 Johns. 109; Browne v. Dula, 3 Murphey, 574; Jones v. Jones, 1 Jones (N. Car.), 495; Packer v. Spangler, 2 Binn. 60; Tipton v. Kahle, 3 Watts, 90; Barger v. Barger, 18 Pa. 489; Jones v. Marrs, 11 Humph. 214; Fitzsimmons v. Cutler, 1 Aiken, 33; Kimmis v. Stiles, 44 Vt. 351; Hogan v. Wilmoth, 16 Gratt. 80, acc. Conf. Sanford v. Gaddis, 13 Ill. 329. — Ed.











which the words charged were, "He swore false before Squire Andrews, and I can prove it." There was no *colloquium* stated, but a mere *innuendo*, that it was in a certain cause depending before a justice, &c. There was a general verdict for the plaintiff, and it was objected that the above words did not amount to a charge of perjury, which consisted in swearing falsely in a matter material to an issue, or point in question, before some court. A person might swear falsely, yet not be guilty of the crime of perjury. It was contended that the count was bad, and not helped by the *innuendo*, nor could the verdict be amended.

*Van Vechten* and *Shepherd*, contra, contended that the old and strict rule of construction had been done away; that words are to be taken in their natural sense, and as they would be understood by the hearers. Though the meaning of the words, in themselves, be uncertain, yet, if, from the circumstances and manner in which they were spoken, it is obvious they were uttered maliciously, and with a view to disparage another, the jury and the court may make the inference as to their meaning, here put in the *innuendo*. They cited various cases in which the words were equally uncertain, yet held sufficient. Yet, if this count were bad, still the verdict might be amended by the notes of the judge, so as to apply it to the good counts.

*Per Curiam.* The count in question is certainly bad; but as it appears from the judge's certificate that the evidence did not particularly apply to that count, we are of opinion that the judgment ought not to be arrested, but that the plaintiff have leave to enter up his judgment on the good counts, on payment of costs. *Motion denied.*<sup>1</sup>

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## BROOKER v. COFFIN.

SUPREME COURT OF JUDICATURE, NEW YORK, NOVEMBER, 1809.

[Reported in 5 *Johnson*, 188.]

THIS was an action for slander. The declaration contained two counts.<sup>2</sup> The first charged that on the 1st of January, 1808, at Schaghticoke, in the county of Rensselaer, &c., for that whereas the plaintiff being a person of good name, &c., the defendant falsely and maliciously did speak and utter of and concerning the plaintiff, the following false, scandalous, and defamatory words: "She" (meaning the plaintiff) "is a common prostitute, and I can prove it."

<sup>1</sup> *Ashbell v. Witt*, 2 N. & McC. 364, acc.; *Canterbury v. Hill*, 4 St. & Port. 224; *Rue v. Mitchell*, 2 Dall. 58; contra. See *Ireland v. Goodale*, Cro. Eliz. 730. — ED.

<sup>2</sup> Only so much of the case is given as relates to the first count. — ED.

There was a general demurrer to the first count.

*Wendell*, in support of the demurrer. In England there are various statutes for the punishment of disorderly persons. But the decisions in support of the action have been where the party shows a special damage, as for calling a woman a whore, whereby she lost her marriage. Notwithstanding the statutes against disorderly persons, it has never been held that those words were actionable, without alleging a special damage. It is true, that by the act for apprehending and punishing disorderly persons, a common prostitute is declared to be a disorderly person, and therefore liable to punishment; but, by the same act, vagrants, beggars, jugglers, pretenders to physiognomy, palmistry, or such crafty sciences, fortune-tellers, discoverers of lost goods, persons running away from their wives and children, vagabonds, and wanderers, and all idle persons not having visible means of livelihood, are also declared to be disorderly persons, and are equally liable to be apprehended and punished under the act. If, then, to call a woman a common prostitute is actionable, without alleging special damage, on the ground of a liability to punishment under this act, then to call a person a juggler, fortune-teller, or physiognomist, would also be actionable, which will hardly be pretended.

*Sedgwick*, contra. The numerous cases to be found in the books relative to the action of slander, and as to what words are actionable, and what are not, are so contradictory and absurd as to afford no satisfactory rule on the subject. Resort must, therefore, be had to the principle on which the action of slander is founded. Where the words spoken impute to a person an act of moral turpitude or crime which may subject him to punishment, they are actionable. Here the words, besides imputing great moral turpitude, and tending to render the person odious in the opinion of mankind, may, if true, also subject the party to an infamous and disgraceful punishment. Common prostitutes, by the act which has been cited, are declared disorderly persons, and may be sent to bridewell or house of correction, and be kept to hard labor for sixty days, or even for six months; and, moreover, may be whipped at the discretion of the general sessions of the peace. The first set of words charged in the declaration are, according to the general principle I have stated on this subject, actionable.

*Wendell*, in reply, observed, that if to say of a person what, if true, might subject him to an indictment, would render the words actionable, without alleging special damage, then to say of a person that he had committed an assault and battery on another, would be actionable.

SPENCER, J., delivered the opinion of the court. The first count is











for these words, "She is a common prostitute, and I can prove it;" and the question arises, whether speaking these words gives an action without alleging special damages. By the statute (1 R. L. 124), common prostitutes are adjudged disorderly persons, and are liable to commitment by any justice of the peace, upon conviction, to the bridewell or house of correction, to be kept at hard labor for a period not exceeding sixty days, or until the next general sessions of the peace. It has been supposed that, therefore, to charge a woman with being a common prostitute, was charging her with such an offence as would give an action for the slander. The same statute which authorizes the infliction of imprisonment on common prostitutes, as disorderly persons, inflicts the same punishment for a great variety of acts, the commission of which renders persons liable to be considered disorderly; and to sustain this action would be going the whole length of saying, that every one charged with any of the acts prohibited by that statute, would be entitled to maintain an action for defamation. Among others, to charge a person with pretending to have skill in physiognomy, palmistry, or pretending to tell fortunes, would, if this action is sustained, be actionable. Upon the fullest consideration, we are inclined to adopt this as the safest rule, and one which, as we think, is warranted by the cases. In case the charge, if true, will subject the party charged to an indictment for a crime involving moral turpitude, or subject him to an infamous punishment, then the words will be in themselves actionable; and Baron Comyns considers the test to be, whether the crime is indictable or not. 1 Com. tit. Action on the Case for Defamation, F, 20. There is not, perhaps, so much uncertainty in the law upon any subject as when words shall be in themselves actionable. From the contradiction of cases, and the uncertainty prevailing on this head, the court think they may, without overleaping the bounds of their duty, lay down a rule which will conduce to certainty, and they therefore adopt the rule I have mentioned as the criterion. In our opinion, therefore, the first count in the declaration is defective.

*The defendant must, therefore, have judgment.*<sup>1</sup>

<sup>1</sup> Hillhouse v. Peck, 2 St. & Port. 395 (Breaking open and reading letters sent by mail); Heath v. Devaughn, 37 Ala. 677 (Trading with slaves); McCuen v. Ludlum, 2 Harr. 12 (Breaking open letters), acc.

For cases recognizing the general rule suggested in the principal case, but holding actions to be maintainable, see Perdue v. Burnett, Minor, 138 ("You have altered the marks of four of my hogs"); Miller v. Parish, 8 Pick. 384 (Fornication); Woodbury v. Thompson, 3 N. H. 194 (Fornication), *semble*; Todd v. Rough, 10 Serg. & R. 18 (Removing a landmark), where crimes were imputed punishable only by fine.

Frisbie v. Fowler, 2 Conn. 707 (Unchastity); Hoag v. Hatch, 23 Conn. 585 (Bribery at elections); Pledger v. Hathcock, 1 Ga. 550 (Unchastity); Richardson v. Roberts, 23 Ga. 215 (Fornication); Burton v. Burton, 3 Greene, 316

## DEXTER v. TABER.

SUPREME COURT OF JUDICATURE, NEW YORK, MAY, 1815.

[Reported in 12 Johnson, 239.]

THIS was an action of slander, and was tried at the Herkimer circuit, the 30th of May, 1814, before Mr. Justice Van Ness. The words charged were, "You" (the plaintiff) "are a thief; you" (the plaintiff) "are a damned thief."

The words proved at the trial to have been spoken by the defendant were: "You" (the plaintiff) "are a thief; you stole hoop poles and saw logs from off Delancey's and Judge Myers's land."

The witnesses said that they supposed the words spoken alluded to the cutting of standing timber, but they did not know the defendant's meaning.

The judge told the jury that it was for them to decide whether the words, as proved, amounted to a charge of theft, or of trespass merely; that if, by the words, the defendant meant to charge the plaintiff with secretly taking timber already cut into hoop poles and saw logs, it was a charge of theft; but if they meant only that the plaintiff had secretly cut and carried away timber from off the land, in order to make hoop poles, &c., it amounted to a charge of trespass only; and, in that case, the words were not actionable; and that this was his impression as to the meaning of the words. The jury found a verdict for the defendant.

(Malicious killing of a cow); Mills v. Wimp, 10 B. Mon. 417 (Attempt to poison); Bissell v. Cornell, 24 Wend. 354 (Aiding in procuring an abortion); Young v. Miller, 3 Hill, 21 (Removing a landmark); Crawford v. Wilson, 4 Barb. 504 (False declaration of right to vote); Johnson v. Brown, 57 Barb. 118 (Procuring an abortion); Andres v. Koppenheaver, 8 Serg. & R. 255 (Libeller); Beck v. Stitzel, 21 Pa. 522 (Secreting and smuggling property by an administration); Klumph v. Dunn, 66 Pa. 141 (Adultery); Dial v. Holter, 6 Ohio St. 228 (Removing landmarks); Gage v. Shelton, 3 Rich. 242 (Malicious killing of a horse); Smith v. Smith, 2 Sneed, 473 (Selling liquor to slaves); Murray v. McAllister, 38 Vt. 167 (Malicious destruction of another's fruit-trees); Ranger v. Goodrich, 17 Wis. 78 (Adultery); Filber v. Dautermann, 26 Wis. 518 (Attempt to procure an abortion); Thirman v. Matthews, 1 Stew. 384; Kinney v. Hosea, 3 Harringt. 77; Giddens v. Mirk, 4 Ga. 364; Johnson v. Shields, 1 Dutch. 116; Widrig v. Oyer, 18 Johns. 124; Martin v. Stilwell, 13 Johns. 275; Demarest v. Haring, 6 Cow. 76; Case v. Buckley, 15 Wend. 327; Quinn v. O'Gara, 2 E. D. Smith. 388; Wright v. Paige, 3 Keyes, 581. See, as recognizing the same rule, Shaffer v. Kintzer, 1 Binn. 542; Bloom v. Bloom, 5 Serg. & R. 392; Gosling v. Morgan, 32 Pa. 273, *semble*; Alfele v. Wright, 17 Ohio St. 238, *semble*; Hollingsworth v. Shaw, 19 Ohio St. 430, *semble*; McAnally v. White, 3 Sneed, 26; Poe v. Grevor, 3 Sneed, 666; Redway v. Gray, 31 Vt. 292; Montgomery v. Deeley, 3 Wis. 709, where crimes were imputed punishable both by fine and imprisonment.

—ED.









A motion was made to set aside the verdict, and for a new trial.

*H. Bleecker*, for the plaintiff. He cited *Cro. Jac.* 166; *Yelv.* 152; *Ld. Raym.* 959.

*Storrs*, contra. He cited 1 *Johns. Cases*, 279.

*Per Curiam.* The motion for a new trial must be denied. The slanderous words charged in the declaration are, that the defendant said to the plaintiff, "You are a thief." The witness who proved the speaking of these words went on to explain in what connection and in reference to what subject the words were spoken, to wit, "You are a thief, you have stolen hoop poles and saw logs from off Delancey's and Judge Myers's land," alluding to certain woodlands belonging to those persons. The charge thus made may be equivocal and somewhat doubtful; and, had the whole charge as made and proved been set out in the declaration, and if this was a motion in arrest of judgment, it might well be contended that the words import a charge of felony. But it was correctly stated to the jury that if the defendant intended to charge the plaintiff with taking hoop poles and saw logs already cut, it was a charge of felony. But if he only meant to charge him with cutting and carrying them away, it was only charging him with having committed a trespass. And in what sense the words were intended to be used was for the jury to determine. This point is well settled, both in our own and in the English courts. 1 *Johns. Cas.* 279; *Wm. Black. Rep.* 959; *Cowp.* 278; 9 *East*, 96. The terms "hoop poles" and "saw logs," in common parlance, are used indiscriminately, as applicable both to standing and felled timber of these descriptions. And the jury have found that the words were used in the former sense, and, of course, not amounting to a charge of felony; and the facts in the case fully warrant the finding of the jury.

*SPENCER, J.*, dissented. The words laid are, "You" (the plaintiff meaning) "are a damned thief;" the proof was, that the words spoken were, "You" (the plaintiff) "are a thief; you stole hoop poles and saw logs from off Delancey's and Judge Myers's lands." The judge, without any proof explaining the words, other than an imagination of the witnesses, that the words related to cutting standing timber, though they said they did not know what the defendant's meaning was, left it to the jury to determine their meaning, with an intimation that it was intended to charge the plaintiff with a trespass. The jury found for the defendant.

In *Van Rensselaer v. Dole*, the words considered slanderous were proved to have been understood by the witnesses to relate to a transaction the day before, and used in reference to it. This was held to qualify the words, and that if understood in the qualified sense, they were not actionable; but here there is no qualification, and we must



construe the words in their ordinary sense. The words, "You are a thief," unaccompanied with any explanation, are actionable. It is not necessary to add the particular thing stolen, for it is to be intended that the words import a stealing of something which could be the subject of larceny. It has not been urged as an objection that the additional words proved ought to have been stated in the declaration; and it could not be urged with success, unless, indeed, the additional words did qualify those alleged. In *Lo v. Saunders*,<sup>1</sup> the words were, "Thou hast stolen my wood;" on demurrer, it was adjudged for the plaintiff; for, say the court, it shall be taken in the worst part; and wood is to be intended of that which is cut down, according to the ancient rule, *arbor dum crescit, lignum dum crescere nescit*.

In *Higgs v. Austen*,<sup>2</sup> the words are, "Thou hast stolen as much wood and timber as is worth £20." The jury found the words, with this addition, "off my landlord's grounds;" and it was adjudged for the plaintiff, for the words found by the jury more than were in the declaration do not qualify the first words.

In *Baker v. Pierce*, the words were, "John Baker stole my box-wood, and I will prove it." There was a verdict for the plaintiff, and a motion in arrest of judgment, and judgment for the plaintiff. Holt, C. J., said, Where words tend to slander a man and take away his reputation, he should be for supporting actions, because it tends to preserve the peace; and that in most cases where such words have been held actionable there are other words of an ill sense to explain them. Admitting that the words, "You stole hoop poles and saw logs," are equivocal, and that they do not import absolutely that the poles were cut or the trees felled; yet, when connected with the positive charge, "that the plaintiff was a thief," I think we must intend that the poles and trees were cut down. Properly speaking, hoop poles and saw logs are severed from the land; they are neither whilst growing. If a man will charge a felony, and attempt to escape the effects of the charge, by additional words, these words ought to qualify the first charge, by showing that a felony was not committed. These additional words do not, for they are, at least, equivocal.

I think the learned judge incorrect in leaving the cause, as he did, to the jury. There was no local meaning in the words; nothing peculiarly for the jury to pass on. The sense of the words being collected, as far as could be, the construction of slanderous, or not slanderous, belonged to the court.

I am of opinion that a new trial ought to be granted, with costs to abide the event of the suit.

*New trial refused.*<sup>3</sup>

<sup>1</sup> Cro. Jam. 166.

<sup>2</sup> Yelv. 152.

<sup>3</sup> *Guildeslew v. Ward*, Cro. El. 225, *contra*. See *Burbank v. Horn*, 39 Me. 233.









## JONES v. M'DOWELL.

COURT OF APPEALS, KENTUCKY, OCTOBER 7, 1815.

[Reported in 4 Bibb, 188.]

OPINION of the court by OWSLEY, J. This was an action for slanderous words brought by the appellee against the appellant in the court below. The declaration contains two counts.<sup>1</sup> The first charges the appellant of having said that "he saw the appellee take corn from Aaron Rainy's crib twice, and look round to see if any person saw him measuring," &c. Demurrer and judgment for the appellee.

From this judgment the appellant has appealed to this court. The first question made by the assignment of errors is, Are the words laid in the first count actionable?

Whether they are actionable or not turns exclusively upon the construction which may be given to them. If they imply a felony in taking of the corn, then, as they tend to subject the appellee to criminal punishment, they are most clearly actionable; but if they import nothing but a bare trespass, the appellee cannot be said to have been put in danger of legal punishment, and no action can be maintained for the speaking of them. According to the old rule of construing words *in mitiori sensu*, the latter meaning would prevail; for the words laid may be true, and nothing but a trespass have been committed. But that rule of construction, as justly observed in the case of *Logan v. Steele*,<sup>2</sup> "has long since been exploded, and has given way to one which accords more with reason and the common sense of mankind,—that of construing words in that sense in which they would be understood by those who hear or read them." If the words laid in the first count are tested by this rule, and taken in their usual acceptation, they obviously import a charge of felony. That the words mean something more than a naked trespass is evident; for, if that had been the only meaning intended to be conveyed, the simple charge of taking the corn would have affected the object; but when the charge of taking is connected with expressions of the manner the appellee acted in the taking, it shows clearly the speaker of the words intended to communicate the idea (and that the hearers must so have understood them) that the corn was taken with a felonious intent.

The judgment must be affirmed with costs and damages.<sup>3</sup>

<sup>1</sup> Only so much of the case is given as relates to the first count, and the statement of the case has been slightly abridged. — Ed.

<sup>2</sup> 1 Bibb's Rep. 594.

<sup>3</sup> *Hess v. Fockler*, 25 Iowa, 9; *Dixon v. Stewart*, 33 Iowa, 125; *Hamilton v.*

## SHERWOOD v. CHACE.

SUPREME COURT OF JUDICATURE, NEW YORK, OCTOBER, 1833.

[Reported in 11 *Wendell*, 38.]

ERROR from the Yates Common Pleas. Sherwood sued Chace for slander, and stated in his declaration that he was of good fame, and not suspected of the crime of perjury, until, &c.; that before the speaking of the words complained of, a certain action had been depending before W. Bassett, Esq., a justice of the peace in and for the county of Yates, wherein one James L. Sherwood was plaintiff, and Richard P. Brown was defendant, which had been tried, and on such trial the plaintiff, William B. Sherwood, had been examined on oath, and had given evidence as a witness for and on the part and behalf of the plaintiff in that suit; that the defendant, knowing the premises, but contriving to injure the plaintiff, and to cause it to be suspected that he had been guilty of perjury, in a certain discourse which he had with the plaintiff, of and concerning him the plaintiff, in a religious meeting, in the presence and hearing of divers good and worthy citizens, spoke these false, scandalous, and defamatory words: "I cannot enjoy myself in a meeting with Sherwood, for he has sworn false, and I can prove it; and if you" (meaning the by-standers) "do not believe it, you can go to Esquire Bassett's and see it, in a suit between James L. Sherwood, plaintiff, and Richard P. Brown, defendant." The defendant pleaded *non cul.*, and gave notice of special matter; the cause was tried and the plaintiff had a verdict, but the judgment was arrested by the Common Pleas for the insufficiency of the declaration. A judgment *pro forma* was rendered against the plaintiff at his request, and he sued out a writ of error.

*E. Van Buren*, for the plaintiff. *R. N. Morrison*, for the defendant.

By the court, SAVAGE, C. J. A charge of false swearing is actionable when it necessarily conveys to the mind of the hearer an imputation of perjury; otherwise it is not. In *Hopkins v. Beedle*, the words were, "You have sworn to a lie, and I can prove it." The court say that swearing to a lie does not necessarily imply that the party has, in judgment of law, perjured himself; the words are suscep-

Smith, 2 Dev. & Bat. 274; *Davis v. Johnston*, 2 Bail. 579; *Morgan v. Livingston*, 2 Rich. 573; *Cregier v. Bunton*, 2 Rich. 395; *Marshall v. Gunter*, 6 Rich. 419; *Galloway v. Courtney*, 10 Rich. 414; *Mayson v. Sheppard*, 12 Rich. 254, acc. See also *Bornman v. Boyer*, 3 Binn. 515; *M'Kennon v. Green*, 2 Watts, 352; *M'Almont v. M'Clelland*, 14 Serg. & R. 352; *Dottarar v. Bushey*, 16 Pa. 204; *M'Adams v. Reney*, 4 Hayw. 252; *Watson v. Nicholas*, 6 Humph. 174; *Hancock v. Stephens*, 11 Humph. 507.

— ED.











tible of an innocent meaning : they may mean extra-judicial swearing ; and it was held that the charge was defective, in not stating any court, or competent officer, before whom the plaintiff swore. In *Pelton v. Ward*,<sup>1</sup> the words were, " You swore to a damned lie, and you knew it, for which you now stand indicted ; " the court said that the words in this instance could mean nothing less than perjury, for it was an allegation that the plaintiff had sworn to such a lie as rendered him obnoxious to an indictment. The cases of *Fox v. Vanderbeck*<sup>2</sup> and *Gilman v. Lowell*<sup>3</sup> were also decided on the same principle. In *Stafford v. Green*, the words were, " He swore false before 'Squire Andrews, and I can prove it." There was no *colloquium* nor averment that a cause was pending before a justice. The court said the count was bad ; there was nothing to show that a judicial proceeding was referred to. In *Ward v. Clark*,<sup>4</sup> the words were, " He has taken a false oath in 'Squire Jamison's court." There was no *colloquium* or averment that 'Squire Jamison was a justice of the peace ; and the court held these words insufficient ; they did not necessarily convey a charge of perjury ; it did not appear that Jamison had authority to hold a court, or administer an oath. The court add, that for a charge of false swearing no action lies, unless the words had reference to a judicial court or proceeding. In *McClaghry v. Wetmore*,<sup>5</sup> it was held that the words were actionable. There it was averred that while the plaintiff was giving material testimony in a suit before a justice who had jurisdiction, the defendant said, " that is false." In *Niven v. Munn*,<sup>6</sup> after verdict for the plaintiff, the defendant moved in arrest. The declaration stated, that in a certain discourse about a trial between Munn and Wilson, before a justice of the peace, and concerning the testimony of the plaintiff, who was a witness, the justice having power to administer an oath, the defendant said, " What he has sworn is a damned lie." The court held the declaration good, and Mr. Justice Platt says, All that was wanting to render this a complete and formal definition of perjury was, that it was not averred that the justice had jurisdiction of the cause, and that the testimony was upon a point material. The words here, however, were held sufficient after verdict. In *Chapman v. Smith*,<sup>7</sup> the court observe, that charging a person with false swearing before a justice, without a *colloquium*, showing that it referred to a trial or other legal occasion, was not actionable ; but that charging a person with taking a false oath in a court was actionable ; they refer to 6 Johns. R. 82, in which it was averred that the plaintiff was testifying to a point material, but judgment would not have been arrested if that averment

<sup>1</sup> 3 Caines, 73.<sup>2</sup> 5 Cowen, 513.<sup>3</sup> 8 Wendell, 573.<sup>4</sup> 2 Johns. R. 10.<sup>5</sup> 6 Johns. R. 82.<sup>6</sup> 13 Johns. R. 48.<sup>7</sup> 13 Johns. R. 80.

had been omitted; for after verdict it must be intended that malice was proved. In *Pangburn v. Ramsay*,<sup>1</sup> this court recognize the doctrine that where the declaration contains a defect which would have been fatal on demurrer, yet, if the issue be such as required on trial proof of the facts defectively set out, and without which the verdict could not regularly have been given, such defect is cured by the verdict at common law. This doctrine is applied in *Chapman v. Smith* to that case, and the verdict cured the defects in the declaration, which were the want of averments that the testimony was material, and that the justice had power to administer an oath.

If a verdict is sufficient to cure the want of the averments of materiality in the testimony, and of jurisdiction in the justice to administer an oath, it will also cure all the defects in this count. The words are not aided by the matter stated in the inducement, because the *colloquium* is not of that matter, but the words themselves relate to a trial in a court before a justice of the peace in a civil cause, when an oath was administered. There can be no trial before a justice where false swearing to a material point would not be perjury; the words cannot relate to an extra-judicial oath, for they allude to an oath on a trial at law. And where the defendant alleged that the plaintiff swore false, — so false that the defendant could not enjoy himself in a religious meeting with him, — he negatives the idea that the oath was false by mistake; of course it was wilful and corrupt; in other words, perjury.

In my opinion the words import a charge of perjury; and if the count does not state it with all proper precision, still the verdict cures all these defects, as all the facts which should have been averred must have been proved upon the trial. The judgment in the court below should not have been arrested, and the judgment of the Common Pleas must therefore be reversed with costs, and a *venire de novo* must issue.<sup>2</sup>

<sup>1</sup> 11 Johns. R. 142.

<sup>2</sup> *Magee v. Stark*, 1 Humph. 506, acc. See also *Spooner v. Kee'ler*, 51 N. Y. 527. — Ed.











## ROBERTS v. CHAMPLIN.

SUPREME COURT OF JUDICATURE, NEW YORK, JULY, 1835.

[Reported in 14 Wendell, 120.]

ERROR from the Yates Common Pleas. Roberts sued Champlin in an action of slander. The plaintiff alleged that he had been sworn and testified as a witness in a suit before a justice of the peace, in which Champlin was the plaintiff and one Burtch was defendant, and that in a conversation respecting the plaintiff and the testimony given by him in that suit, the defendant charged the plaintiff with having sworn false and perjured himself. There was also a count charging the defendant with imputing to the plaintiff the crime of perjury generally, without reference to any particular suit. On the trial of the action of slander it was proved that the suit of Champlin against Burtch was an action of trespass *quare clausum fregit*, that Roberts was sworn as a witness on the trial of that suit, and testified that Champlin had said that he would sue Burtch from Starkey to Benton, *i. e.*, from one town to another, which was the whole amount of his evidence. Several witnesses proved the words alleged in the declaration, but testified that the false swearing imputed to the plaintiff had reference to the testimony given by him on the trial between Champlin and Burtch. The counsel for the defendant insisted that the evidence given by Roberts on the trial of the suit of Champlin against Burtch was not material to the issue then tried, and that therefore the words for the speaking of which this action was brought were not actionable, and moved that the plaintiff be nonsuited. The court granted a nonsuit, and the plaintiff sued out a writ of error.

*C. P. Kirkland*, for plaintiff in error. *I. L. Wendell*, for defendant in error.

By the court, SAVAGE, C. J. False swearing in a cause, unless to some fact material to the issue, is not perjury, and is not the subject of indictment or punishment; and as this class of slanderous words are actionable in themselves only when they impute a crime punishable by law, it follows, that to charge a man with false swearing simply is not actionable, unless reference is made at the time to testimony given wherein the crime of perjury might have been committed. In an action of this nature, where the words spoken do not necessarily import perjury, the plaintiff is bound to show that he swore under such circumstances that he might have been guilty of the crime. He must therefore prove that the testimony alluded to by the defendant and charged as false was material. In this respect the plaintiff failed, in the court below, in sustaining his action upon the words which impute

false swearing. Whether the plaintiff had said he would sue Burtch from Benton to Starkey or not, was totally immaterial to the issue then on trial. It did not prove nor disprove that Burtch's children or cattle or geese had trespassed upon the plaintiff, nor could it affect the damages. Thus far, therefore, the court below were clearly right. To some of the witnesses the defendant added, that the plaintiff had perjured himself. When this was said, and explained to mean the testimony alluded to, the charge carried with it its antidote. It was impossible that perjury could have been committed in the testimony to which allusion was made; the words, therefore, are not actionable any more than those of false swearing. To say that A. B. committed perjury in an extrajudicial affidavit, or any oath not sanctioned by law, is not actionable, because the legal technical crime of perjury could not have been committed. The same consequence must follow where the charge is made of immaterial testimony. The facts sworn to by the plaintiff were no more legal material testimony in the cause, than if the oath had been taken out of court, or before a person not authorized to administer it. The materiality of the testimony is as essential an ingredient in the crime of perjury as the legality of the oath itself.

I am aware that this doctrine is liable to serious objections. The same injury may be done to the character of the accused by a charge of false swearing or of perjury, when perjury could not be committed, as if it could; and it may produce the same or even greater tendency to a breach of the peace. But we find the law settled that words of this description are not actionable unless they import a charge of perjury. It is also settled that any words imputing a crime in terms may be so qualified and explained by concomitant circumstances as to become not only neutralized but even innocent. From the application of these principles to this case it results that the words spoken were not actionable.

The court below decided correctly, and their judgment must be affirmed.<sup>1</sup>

<sup>1</sup> Croford v. Blisse, *supra*, p. 642; Michell v. Brown, 1 Roll. Abr. 70, pl. 45; Myan v. Okey, Freem. 17; Browne v. Brinkley, Ow. 58; Horn v. Foster, 19 Ark. 346; Darling v. Banks, 14 Ill. 46; Sibley v. Marsh, 7 Pick. 38; Palmer v. Hunter, 8 Mo. 512; Harris v. Woody, 9 Mo. 113; Bullock v. Koon, 9 Cow. 30; Ross v. Rouse, 1 Wend. 475; Bullock v. Koon, 4 Wend. 531; Power v. Price, 12 Wend. 500; Wilson v. Oliphant, Wright (Ohio), 153; Studdard v. Linville, 3 Hawks, 474; Wilson v. Clous, 2 Speer, 1; Cannon v. Phillips, 2 Sneed (Tenn.), 185; Vliet v. Rowe, 1 Pinn. 413, acc. In Coons v. Robinson, 3 Barb. 625, and Dalrymple v. Lofton, 2 Speer, 588, it was held that the *onus* was upon the defendant to prove the immateriality of the plaintiff's evidence. Conf. M'Claughry v. Wetmore, 6 Johns. 82; Niven v. Munn, 13 Johns. 48; Chapman v. Smith, 13 Johns. 78; Hutchins v. Blood, 25 Wend. 413; Howard v. Sexton, 4 N. Y. 157; Palmer v. Bogan, 2 McMullan, 122; s. c. Cheves, 52. — Ed.









## CORNELIUS v. VAN SLYCK.

SUPREME COURT OF JUDICATURE, NEW YORK, JANUARY, 1839.

[Reported in 21 Wendell, 70.]

DEMURRER to declaration. The plaintiff declared in slander, for that the defendant in a discourse had with the plaintiff, in the presence and hearing of divers citizens, uttered these words, "You will steal, and I can prove it," adding, "thereby meaning and intending to have it understood and believed by those citizens last aforesaid, that the said plaintiff had been guilty of stealing, or larceny." There was a second count, charging the words to have been spoken of and concerning the plaintiff in the third person, "he will steal," &c., with a like averment as in the first count. The defendant demurred, for that the words did not impute a crime; that they imputed only a disposition to steal, and therefore were not actionable.

*S. Stevens*, for the defendant. An action does not lie for words charging an intent to commit a crime, unless the intent be made punishable by statute. If the words were spoken under circumstances which would authorize a jury to find that the object of the defendant was to impute a crime, the circumstances should have been stated, and the plaintiff ought specially to have averred that such was the object of the speaker, as was held in *Andrews v. Woodmanse*.<sup>1</sup> Here is a mere *innuendo*, and that is not sufficient. 5 Johns. R. 211; 16 Wendell, 9.

*D. Wright* and *M. T. Reynolds*, for the plaintiff.

By the court, COWEN, J. Taking all the words together, you or he "will steal, and I can prove it," we think they may very well be taken to import a charge that the plaintiff had stolen, and may therefore be laid with an *innuendo* to that effect. How could the defendant prove that the plaintiff would steal without showing an act of larceny, and seeking to infer the propensity from that? Other modes of proof might perhaps be conceived of, but not very easily. It must require an effort of the mind, which few by-standers would exert. One inquiring the character of another, and receiving for answer "he will steal," would, it seems to me, of itself, and without any thing more, be at once understood by the inquirer as equivalent to saying he had stolen. Words should be taken in the sense in which they would probably be understood by the hearers. Where they plainly import a charge of mere intention to do a criminal act, or only amount to an assertion that the plaintiff will do it at a future time, they are not actionable;

<sup>1</sup> 15 Wend. 233.



yet a party cannot protect himself from an action by the mere grammatical structure of his phrase. *Goodrich v. Woolcott*<sup>1</sup> is certainly an authority for saying that words of more equivocal meaning than these will sustain a verdict, there being an averment that they were meant and understood to charge a crime; and I collect from the reasoning of the court that they would have held the declaration good against a demurrer. A man says of another, he will get drunk, he will lie, or use profane language; would the hearer doubt that a charge of his being habitually addicted to such vices was intended? And supposing them to be slanderous, which they would be in some cases, as if uttered of a clergyman, who would deny that such an import might be directly affixed to them by a mere *innuendo*? *A fortiori*, if followed by stating that the vices insinuated in such a form could be proved?

We think the demurrer is ill taken; and that judgment must be for the plaintiff.<sup>2</sup>

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### JACOBS v. FYLER.

SUPREME COURT, NEW YORK, OCTOBER, 1842.

[Reported in 3 Hill, 572.]

SLANDER, for words imputing perjury, tried before Moseley, C. J., at the Onondaga circuit, September 30th, 1841. The action was brought by Amasa Jacobs against Asa Fyler. The declaration set forth a suit tried at a Circuit Court in Onondaga County, between Matthew L. Winne, plaintiff, and the said Asa Fyler, defendant, averring that Jacobs was there sworn and gave material testimony on the part and behalf of the said Winne, &c., and that the words complained of were spoken of and concerning the said Jacobs and his testimony so given in said suit, &c.

On the trial, the proof was of a suit in which Matthew L. Winne was plaintiff, and Asa Fyler and Orrin Fyler were defendants; and that the present defendant, in speaking of the suit after it had been tried, said, that Jacobs (the present plaintiff) had sworn false, and ought to be dealt with in the church. On another occasion he said to one Aylsworth, referring to the same suit, that Jacobs had sworn false to his injury of six or seven hundred dollars. The defendant objected, 1. That the proof varied from the declaration in respect to the suit in

<sup>1</sup> 3 Cowen. 231.

<sup>2</sup> Conf. *Gibson v. Williams*, 4 Wend. 320; *Ex parte Bailly*, 2 Cow. 479. — Ed.









which the plaintiff's alleged testimony was given; 2. That there was no sufficient evidence of his having been sworn in the suit mentioned in the declaration; 3. That the materiality of the testimony, if any had been given, was not shown. The circuit judge overruled these objections, and submitted the cause to the jury; whereupon the defendant's counsel excepted. Verdict for the plaintiff. The defendant now moved for a new trial on a bill of exceptions.

*J. A. Spencer*, for the plaintiff, insisted that the several objections taken at the trial were well founded, and should have been allowed. He cited 3 Stark. Evid. 1143 (3d Am. ed.); *Bullock v. Koon*; <sup>1</sup> *McClaghry v. Wetmore*; <sup>2</sup> *Crookshank v. Gray*; <sup>3</sup> *Ross v. Rouse*; <sup>4</sup> *Chapman v. Smith*; <sup>5</sup> *Power v. Price*.<sup>6</sup>

*B. D. Noxon*, contra, cited in answer to the first point, 2 Saund. Pl. & Ev. 796, 7; id. 807 to 809; *May v. Brown*; <sup>7</sup> *Potter v. Hopkins*; <sup>8</sup> *The East Boston Timber Co. v. Persons*.<sup>9</sup> In answer to the second and third points, he cited *Power v. Price*; <sup>10</sup> *Stone v. Clark*; <sup>11</sup> *Carter v. Andrews*.<sup>12</sup>

By the court, COWEN, J. If it was necessary to show the fact that the plaintiff was sworn as a witness, the slander itself impliedly admitted it. That is sufficient. There was no objection that the proof was secondary in degree.

As a general rule, it is to be intended that what a witness has sworn to is material; and when he is charged with having sworn falsely in a judicial proceeding, the charge imports perjury. *Power v. Price*; <sup>13</sup> *Stone v. Clark*.<sup>14</sup> If the defendant mean to escape on the ground that the plaintiff's testimony was in truth immaterial, and so not perjury, he must show that fact on his part. Indeed, he must go much further. He must prove that the slanderous words themselves were so qualified as to come short of imputing the crime of perjury. The injury consists in the fact that the defendant ostensibly charged the plaintiff with perjury. The hearer can know nothing of what actually passed in court to qualify the real nature of the falsehood imputed. Of what possible effect by way of exculpation or mitigation can it be, after telling the plaintiff's neighbors that he had been guilty of a crime, to go further and show that he was innocent? The proposition comes to that. The plaintiff is sworn as a witness. The defendant says he

<sup>1</sup> 9 Cowen, 80.

<sup>2</sup> 6 John. Rep. 82.

<sup>3</sup> 20 id. 344, 349.

<sup>4</sup> 1 Wend. 475.

<sup>5</sup> 13 John. Rep. 78, 81.

<sup>6</sup> 12 Wend. 500; 16 id. 450, s. c. on error.

<sup>7</sup> 3 Barn. & Cress. 113.

<sup>8</sup> 25 Wend. 417.

<sup>9</sup> 2 Hill, 126; 2 R. S. 843, 844 (2d ed.); id. 328.

<sup>10</sup> 16 Wend. 450.

<sup>11</sup> 21 Pick. 51.

<sup>12</sup> 16 id. 1.

<sup>13</sup> 12 Wend. 500, 502; 16 id. 450, s. c. on error.

<sup>14</sup> 21 Pick. 51.

swore falsely. No hearer can presume that he had been telling an idle story having no connection with the cause, for no court would listen to such a story; and therefore the charge must be interpreted as one of perjury. How then can it take from the slander that the plaintiff in fact swore to nothing material? If the defendant said so, very well; then there was no slander; but the whole comes down to the words themselves.<sup>1</sup> *Stone v. Clark*;<sup>2</sup> *Carter v. Andrews*.<sup>3</sup> It is not even necessary to prove that a suit was pending, or to show that the *colloquium* referred to any suit in particular, where the words in themselves amount to a charge of perjury, as it appears to me they did here. *Sherwood v. Chase*,<sup>4</sup> and the cases there cited; *Gilman v. Lowell*.<sup>5</sup> Take the words addressed to Aylsworth: "He has sworn false to my injury six or seven hundred dollars." No one would understand this to be extrajudicial swearing, or telling a white lie. The words, *per se*, import perjury. A pending suit and a *colloquium* concerning it are necessary in those cases only where, without them, the hearer would be left in doubt whether the oath might not have been voluntary. *Gilman v. Lowell*.<sup>5</sup> If the words are incompatible with its being so, the slander is only aggravated by the defendant going behind them, and showing that the plaintiff took a legal or judicial oath, and stated facts which throughout were utterly immaterial and necessarily innoxious. The case of *Bullock v. Coon* \* related to a charge in the face of the arbitrators and audience while the plaintiff was testifying, that he was swearing to a lie. The case turned wholly on the degree of proof which was received at the circuit to show the jurisdiction of the arbitrators. When it was said that materiality should also have been shown, it may have been true of the particular case for reasons not appearing; but it was going beyond the general rule, and beyond the point on which the new trial was granted. Even in respect to the latter, it would, I apprehend, have better accorded with the course of modern and well-considered authority, to have held that ostensible jurisdiction was enough to render the words legally pernicious, and that the bond of submission need not have been produced.

If the words in the case before us were actionable independently of the suit and oath recited, and the *colloquium* alluding to that suit, then the question of variance is unessential. It can hardly be said

<sup>1</sup> *Harris v. Purdy*, 1 Stew. 231; *Harbison v. Shook*, 41 Ill. 141 (Statutory); *Fowle v. Robbins*, 14 Mass. 498; *Stone v. Clark*, 21 Pick. 51; *Wood v. Southwick*, 97 Mass. 354; *Lewis v. Black*, 27 Miss. 425; *Butterfield v. Buffum*, 9 N. H. 156; *Power v. Price*, 16 Wend. 450; *Spooner v. Keeler*, 51 N. Y. 527; *Shroyer v. Miller*, 3 W. Va. 158, acc. — Ed.

<sup>2</sup> 21 Pick. 51.

<sup>3</sup> 16 id. 1.

<sup>4</sup> 11 Wend. 38.

<sup>5</sup> 8 Wend. 573, 577.

<sup>6</sup> 9 Cowen, 30.











that here was any variance. The declaration recites a suit of Winne v. Asa Fyler. The suit proved was in truth between those parties; but Orrin Fyler was also defendant. There is no doubt, however, that if this was a misrecital, the pleading was amendable within the statute, and, according to our settled course of practice, if the statute were inapplicable. *New trial denied.*<sup>1</sup>

<sup>1</sup> Coons v. Robinson, 3 Barb. 625, acc.; Mebane v. Sellars, 3 Jones (N. Car.) 199, *contra*. — ED.

*Slander — (continued).*

(b) WORDS DISPARAGING A PERSON IN HIS TRADE, BUSINESS, OFFICE, OR PROFESSION.

## KEMPE'S CASE.

IN THE KING'S BENCH, MICHAELMAS TERM, 1552.

[*Reported in Dyer, folio 72 b, placitum 6.*]

MEMORANDUM. That for these words, "William Kempe will within these two days be a bankrupt," an action upon the case was brought in B. R., and a demurrer in law, and an argument whether it lies, *Quære*. And, as I was informed, judgment was given in that case for the plaintiff. See action upon the case for words, "A. B. is infected with such a robbery and murder, and doth smell of it."<sup>1</sup>

## ANONYMOUS.

IN THE KING'S BENCH, EASTER TERM, 1584.

[*Reported in Moore, 179.*]

AN action was brought in the Queen's Bench for calling the plaintiff, who was an innkeeper, "a caterpillar, for he liveth by robbing of his guests." And all the judges held clearly that the action would not lie; for this is the same as if he had said, "He liveth by powling and pilling," which is incidental to this trade; but if he had said, "He is a caterpillar, and liveth by robbing in the highway," it would be otherwise.

<sup>1</sup> Allen v. Swift, Hutt. 46; Hawkins v. Cutts, Hutt. 49; Johnson v. Lemon, Palm. 63; Leycroft v. Dunker, Cro. Car. 317; Walkenden v. Haycock, Sty. 425; Willison v. Crow, Sty. 75; Cook v. Tucker, Carth. 330; Browne v. Robinson, Freem. 18; Hill's Case, Latch, 114; Garret v. Shelson, 2 Show. 295; Harrison v. Thornborough, 10 Mod. 196; Read v. Hudson, 1 Ray. 610; Simpson v. Barlow, 12 Mod. 591; Vivian's Case, 3 Salk. 326; Hall v. Smith, 1 M. & S. 287; Robinson v. Marchant, 7 Q. B. 918; Brown v. Smith, 13 C. B. 596; Babonneau v. Farrell, 15 C. B. 360; Daines v. Hartley, 3 Ex. 200; Gostling v. Brooks, 2 F. & F. 76; Turner v. Foxall, 2 Cranch C. C. 324; Mott v. Comstock, 7 Cow. 654; Sewall v. Catlin, 3 Wend. 291; Ostrom v. Calkins, 5 Wend. 263; Else v. Ferris, Anthon's N. P. 36; Carpenter v. Dennis, 3 Sandf. 305; Calkins v. Wheaton, 1 Edm. Sel. Cas. 226; Lewis v. Chapman, 16 N. Y. 369. — Ed.











## BIRCHLEY'S CASE.

IN THE QUEEN'S BENCH, MICHAELMAS TERM, 1585.

[Reported in 4 Reports, 16 a.]

BIRCHLEY being one of the attorneys or clerks of B. R., and sworn to deal duly without corruption in his office, the defendant, speaking of the manner of Birchley's dealing in his profession, said to Birchley, "You are well known to be a corrupt man, and to deal corruptly." It was resolved that the said words *ex causa dicendi* imply that Birchley had dealt corruptly in his profession; also it was said, *quod sermo relatus ad personam, intelligi debet de conditione personæ*. And the plaintiff had judgment for two reasons: 1. Because the said scandal touches the plaintiff in his said oath. 2. The said words scandalize him in the duty of his profession, by which he gets his living. Skinner, a merchant of London, said of Manwood, C. B., that "he was a corrupt judge," and it was adjudged that the words were actionable. *Vide* 4 E. 6, *Action sur le Case*, 112. But it was resolved in the principal case that, if the precedent speech had been that Birchley was a usurer, or that he was another's executor, and would not perform the will, &c., and thereupon the defendant had spoke the said words, then no action would be maintainable for them, which agree with the resolution in the Lord Cromwell's Case.<sup>1</sup>

## HILLIARD v. CONSTABLE.

IN THE QUEEN'S BENCH, MICHAELMAS TERM, 1593-94.

[Reported in Croke's Elizabeth, 306.]

ACTION for these words: "Sir Christopher Hilliard is a blood-sucker, and sucketh blood; but if any man will give him a bribe, as sheep, or

<sup>1</sup> Smith v. Andrews, Sty. 183; Dison v. Bestney, 13 Rep. 71; Gibbs v. Price, Sty. 231; Anon., Moore, 180; Box v. Barnaby, Hob. 117; Starkey v. Taylor, Hetley, 139, 143, acc. See Thornton v. Jebson, Hob. 140; Anon., Moore, 61; Jenkinson v. Wray, Moore, 401; Roberts v. Lord, Ley. 70; Carye's Case, Poph. 207; Shire v. King, Yelv. 32; Cuttes v. —, Gold. 85; Yardly v. Ellice, Moo. 855; Anon., Godb. 214; Smayles v. Smith, 1 Brownl. 1, 16; Stephens v. Battyn, 1 Brownl. 3; Jenkins v. Smith, Cro. Jac. 586; Love v. Playter, Cro. Car. 40; Dawburn v. Martyn, Latch, 20; Mead v. Perkins, Cro. Car. 261; Litman v. West, Hetley, 123; Webb v. Nicholls, Cro. Car. 459; Anon., Cro. Car. 516; Jeffryes v. Payhem, Cro. Car. 510; Anison v. Blofield, Cart. 214; Rush v. Cavanaugh, 2 Pa. 187. Conf. Phillips v. Jansen, 2 Esp. 624; Reeves v. Templar, 2 Jur. 137; Foot v. Brown, 8 Johns. 64.

a couple of capons, he will take them." Upon not guilty pleaded, it was found not guilty as to all the words except "he is a blood-sucker, and sucketh blood;" and for them he was found guilty.

The opinion of the court was, upon motion in arrest of judgment, that the last words not being found, an action did not lie for the first; for though he alleged in his declaration that he was a justice of the peace, and one of the council in the North, yet the first words cannot be any slander, for it cannot be intended what blood he sucked. And by the advice of the greater part of all the justices of England, it was adjudged for the defendant.<sup>1</sup>

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### PARRAT v. CARPENTER.

IN THE QUEEN'S BENCH, EASTER TERM, 1596.

[Reported in *Croke's Elizabeth*, 502.]

ACTION upon the case for words. And declares, whereas he was parson of D., and a preacher, that the defendant spake these words: "Parrat" (*innuendo* the plaintiff) "is an adulterer, and hath had two children by the wife of J. S., and I will cause him to be deprived for it." After verdict it was moved that an action lay for these words; for they be very slanderous to the plaintiff, and touch him in his credit and profit, and are cause of deprivation, if they be true. But the court held that it is a slander examinable only in the spiritual court, and not here. Wherefore it was adjudged for the defendant.<sup>2</sup>

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### POE v. MONDFORD.

IN THE QUEEN'S BENCH, MICHAELMAS TERM, 1598.

[Reported in *Croke's Elizabeth*, 620.]

ACTION for words. Whereas the plaintiff was and is a physician, and the defendant, intending to defame and prejudice him in his art, *falsè et malitiosè*, spake of him these words: "Mr. Poe" (*innuendo* the plaintiff) "hath killed Mr. Pasfield, of the Old Jewry, with physic" (*quendam Johannem Pasfield*, late inhabiting within the Old Jewry,

<sup>1</sup> This case was reconsidered, and judgment for the defendant affirmed. Cro. Eliz. 433.

<sup>2</sup> *Nicholson v. Lyne*, Cro. Eliz. 94; *Anon.*, Sty. 49, acc.; *Demarest v. Haring*, 6 Cow. 76, *contra*. See *Payne v. Beuwmorris*, 1 Lev. 248.—ED.









and now deceased, *innuendo*), "which physic was a pill, and the vomit was found in his mouth; and Doctor Atkins and Doctor Paddy" (*quosdam Henricum Atkins et Johannem Paddy*, doctors in physic, *innuendo*) "were there, and found it so, and it is true;" *ubi revera* neither the said Doctor Atkins nor Doctor Paddy, nor any other, ever found any such thing to be committed by him; *et ubi revera* he never administered any physic unto him in pills or otherwise, &c. The defendant pleaded a concord in bar, which plea was ill pleaded (as it was agreed on both sides); whereupon the plaintiff demurred. And now *Coke*, Attorney-General, moved that an action lay not for these words; for it is not any slander to a physician to say of him that he killed one with physic; for he might do it involuntarily, in not knowing the disease, and no discredit unto him. *POPHAM* and *FENNER* held that the action lay not; for it cannot be any discredit to a physician to say that he killed one with physic; it is a usual and common expression, and it may be without any default in him; for they may mistake the diseases in their own bodies, much more in others, and apply wrong medicines, which may be the cause of the patient's death, and yet no discredit unto them; but if it had been that he, *scienter et voluntarie*, ministered physic to one to kill him, that toucheth him in his profession, and the words had been actionable, but not here; and although it be said that he never administered any physic unto him, that is not material; wherefore they, without any argument on the plaintiff's side (*CLENCH*, *repugnante*, and *GAWDY*, *absente*), adjudged it for the defendant.<sup>1</sup>

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### CROOK v. AVERY.

IN THE KING'S BENCH, EASTER TERM, 1614 OR 1615.

[Reported in 2 *Bulstrode*, 216.]

IN an action upon the case for scandalous words spoken by the defendant of the plaintiff, upon *non culp.* pleaded, a verdict was given for the plaintiff. It was moved for the defendant in arrest of judgment that the words were not actionable. The words were these, spoken by the defendant of the plaintiff, being a merchant: "Mr. Crook came into Cornwall with a blue coat on his back; but hath now gotten together a great quantity of wealth by trading with pirates, cozening in the sale of pilchars, and by extortion." These words, *super quoddam col-*

<sup>1</sup> Anon., 1 And. 268; *Watson v. Vanderlash*, Hetley, 69, *contra*. See *Smith v. Taylor*, 1 N. R. 196; *Tutty v. Alewin*, 11 Mod. 221. — ED.



*loquium de prædicto Carolo propalavit*: it was urged that these words are too general, and so not actionable.

COKE, C. J. The best man in the world may trade with pirates; the best merchants of England may have such trading; but this was unknown unto him. 2. Cozening in the sale of pilchars: this goes to merchants, and this is only by mistelling; these words not actionable. 3. He hath extorted. Extortion is *colore officii*; these are very bad words, and do sound in slander; but we are not to give too much way to such actions upon the case for any words, unless here be express authority for the same, or very apparent slander by the words spoken. In the time of King Henry I., and in part of King Edward III., there were no actions upon the case for words, nor assumpsits; but these have very much increased of late times; too much way not to be given to them.

DODDERIDGE. These words, as they are laid in this declaration, are not actionable, they being too general; they ought also to be express words, and scandalous, and not so by implication. The whole court agreed herein, that these words are not actionable, and so the plaintiff ought not to have his judgment; and therefore the rule of the court was that judgment should be stayed, *et quod querens nil capiat per billam*.

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### FLEETWOOD v. CURLEY.

IN THE —, HILARY TERM, 1619.

[Reported in *Hobart*, 267.]

MILES FLEETWOOD, knight, brought an action upon the case against Francis Curley, Esq., and declared, that whereas the king, by his letters-patents, An. 7, did make him general receiver of the court of wards during his life, which office he had justly executed ever since; that the defendant, the 16 of K. Jac., having speech with one Whorewood of the plaintiff, did speak of the plaintiff these words, “M. deceiver” (*innuendo* the plaintiff) “had deceived and cozened the king, and dealt falsely with him, and I have him in question for it, and I doubt not but to prove it ere it be long.” Upon issue not guilty, it was found for the plaintiff before me at Guildhall; in arrest of judgment it was said, that it doth not appear by the words spoken, that they were spoken of the plaintiff; for “M. deceiver” had no propriety to that purpose; and then the *innuendo* will not make it certain, when it appeareth to the court that the words will bear no certainty.









Secondly, it was objected that he did not say that the plaintiff did deceive the king in his office. Yet the court, after divers arguments, gave judgment for the plaintiff. And as to the first exception it was agreed, that if a man should say, looking upon three persons, "One of these three murdered a man," no *innuendo* will help this uncertainty, no more in the person than in the matter of the scandal.

P. 13 Jac. Harvy brought an action against Ducking, for saying that he had forged a writing, *innuendo* a bill of debt, setting down in the *innuendo* all the circumstances; and though he had a verdict, yet could have no judgment. But here it is said, that at the time of the words the defendant had speech of the plaintiff, and expressly that he spake these words of the plaintiff. And then the word "deceiver," though in propriety it doth not import receiver, yet the allusion and ironical resemblance of the name doth very well bear the application of the *innuendo*; and if such a slight evasion should be admitted, it would be a common practice with crafty wits, to slander safely. And if he had said "M. receiver," there had been no doubt.

And as to the second point, it was likewise agreed that words of an ambiguous sense shall receive the best sense; as pox, not the French pox. And 12 Jac. Miles brought an action against Jacob, for saying he had poisoned one Smith, and had judgment in the King's Bench; but we reversed it, because it might be against his will. It was also agreed, that if the plaintiff should have added an *innuendo* that the deceit was in his office, it would have been nothing available. But the court resolved, that upon the whole case here, the words must be understood of themselves, by construction of law, of his office; for words ambiguous must also be of indifferent sense that shall be indifferently taken.

But when there is a pregnant, violent, and certain sense that may lead the court and hearers to take it one way, that shall be taken, and not another imagined, whereof there is no appearance. So here, when you say of the king's receiver that he deceived the king, it must be understood in that wherein it appeareth that he may deceive him, and not to take it at large when no other meaning appears; and therefore not like the case of pox, or poisoning before mentioned; otherwise if he had said, that he had been a common deceiver, without applying it to the king certainly, whose officer he is. Mic. 11 Jac. Yardly being an attorney, brought an action against Ellis, and declared whereas he was retained by one Bancroft against the defendant, he said of him to Bancroft, "Your attorney is a bribing knave, and hath taken twenty pounds of you to cozen me," and had judgment; for it shall be taken spoken of him as an attorney. And Mich. 14 Jac. Box, an attorney, brought an action against Barnaby for calling him

champerter, and had judgment. And it is not material that it is not alleged in this case and the others, that the hearers did know him to be the king's receiver, and the others to be attorneys; and yet it were not actionable, if it were not so; and the slander and damage consist in the apprehension of the hearers; and therefore slanderous words in Welsh bear no action, except you affirm that they were spoken in the hearing of them that understood the Welsh tongue. But when slanderous words are spoken, which are a wrong, the doers are answerable for all evil events and damages. Now the hearers may come to the knowledge, or others to whom they shall report the words may know, that they are persons of that condition that make the words actionable, which in the case of Welsh words cannot be so understood in any reasonable possibility.<sup>1</sup>

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### SQUIRE v. JOHNS.

IN THE KING'S BENCH, MICHAELMAS TERM, 1620.

[Reported in *Croke's James*, 585.]

ERROR of a judgment in the Common Pleas, in an action for words brought by Johns against Squire, wherein he declares, whereas, he is and for ten years last past was a dyer, and during all the said time used to get his living by buying and selling, that the defendant spake of the plaintiff these words, "Thomas Johns, of Hertford" (*innuendo* the plaintiff) "is a bankrupt knave, and is not worth three-half-pence."

After verdict, upon not guilty, and judgment for the plaintiff, error was assigned that these words were not actionable, because they are spoken adjectively; and a dyer, being a mechanical trade, shall not

<sup>1</sup> *Townsend v. Barker*, Sty. 394 (Church-warden); *Strode v. Homes*, Sty. 338 (Church-warden); *Woodruff v. Weoley*, Cart. 1 (Church-warden); *Hopton v. Baker*, 2 Bulst. 228; *Nile v. Swanson*, Yelv. 142 (Town-clerk); *Lee v. Swan*, Godb. 157 (Town-clerk); *Curle's Case*, Winch, 33, 39 (Auditor); *Corbin v. Merson*, 1 Sid. 342; *Henly v. Baynton*, Sty. 436; *Greenfield's Case*, March, 82; *Prinn v. Howe*, 1 Brown Parl. C. 97 (Privy Councillor); *Woodard v. Dowsing*, 2 M. & Ry. 74 (Overseers of Poor); *Harle v. Catherall*, 14 L. T. N. S. 801 (Way-warden); *Forrest v. Hanson*, 1 Cranch C. C. 63 (Bank Director); *Craig v. Brown*, 5 Blatchf. 44 (Postmaster); *Johnson v. Stebbins*, 5 Ind. 264 (Postmaster); *Dodds v. Henry*, 9 Mass. 262 (Town-clerk); *Johnson v. Shields*, 1 Dutch. 116 (Director of a Company); *Dole v. Van Renssaler*, 1 Johns. Cas. 330 (Sheriff); *Lansing v. Carpenter*, 9 Wis. 540 (Court Commissioner); *Wilson v. Noonan*, 23 Wis. 105 (Senator), acc.; *Hutton v. Bech*, Cro. Jac. 339 (Church-warden); *Willis v. Shepherd*, Cro. Jac. 619 (Church-warden), *contra*. — Ed.











have any action for these words; and it was cited to have been adjudged that a weaver shall not have an action for such words, but no record was shown thereof.<sup>1</sup>

But in the principal case, all the court resolved that the action is maintainable; for being alleged that he obtained his living by buying and selling, it is sufficient cause to bring the action; and they held a dyer to be such a trade, that for such words he may well maintain the action. Wherefore judgment was affirmed.<sup>2</sup>

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### BARKER v. RINGROSE.

IN THE KING'S BENCH, MICHAELMAS TERM, 1626.

[Reported in *Popham*, 184.]

BARKER brought an action upon the case against Ringrose, and declared that, whereas he was of good fame, and exercised the trade of a wool-winder, the defendant spake these scandalous words of him, "that he was a bankrupt rogue;" and it was moved in arrest of judgment that these words were not actionable, for the words themselves are not actionable, but as they concern an office or trade, &c., and it appeareth by the statute of 27 Edw. III., that a wool-winder is not any trade, but is but in the nature of a porter, so that the plaintiff is not defamed in his function, because he hath not any; also it is not averred that he was a wool-winder at the time of the words speaking.

JONES, J. If one saith of a wool-winder that he is a false wool-winder, action upon the case lieth; and it was demanded by the court what a wool-winder was; and it was answered that in the country he was taken to be a wool-winder that makes up the fleece and takes the dirt out of it; and a wool-winder in London opens the fleeces, and makes them more curiously up, and in London they belong to the mayn of the staple.

*Doderidge.* If one saith of a sher-man that he is a bankrupt, action lies, and so it hath been adjudged of a shoemaker; and note that if one saith of any man, who by his trade may become a bankrupt within the statute, that he is a bankrupt, an action lies, as of a tailor, fuller, &c. And the court seemed to incline that in this case, being spoken of a wool-winder in London, the action lies. But Mich. 3 Car., the case being moved again, the court was of opinion that the action could not lie, and would not give judgment for the plaintiff.<sup>3</sup>

<sup>1</sup> See *Garret v. Shelson*, 2 Show. 295, *contra*. — ED.

<sup>2</sup> *Meade v. Axe*, March, 15, *contra*. — ED.

<sup>3</sup> *York v. Cecil*, 1 Brownl. 18 (*Tanner*), *acc.* — ED.

## CAWDRY v. HIGHLEY.

IN THE KING'S BENCH, MICHAELMAS TERM, 1632.

[Reported in *Croke's Charles*, 270.]

ACTION for words. Whereas the plaintiff was of good conversation, and exercised in the practice of physic as well in London as in the county of Lincoln and other places, and by reason of his knowledge in the said art was, about twenty years since, made doctor of physic in Cambridge, according to the course of the university, and practised and ministered physic to divers noblemen and others for twenty-one years last past; that the defendant, *præmissorum non ignorus*, out of malice, to scandalize him with his patients, and to withdraw them from meddling with him, said of the plaintiff, and to the plaintiff, in the presence and hearing of divers, "Thou art a drunken fool and an ass; thou wert never a scholar, and art not worthy to speak to a scholar, and that I will prove and justify." After not guilty pleaded, and found for the plaintiff,

*Hutton* moved that the action lies not; for he doth not show there was communication with any concerning his skill in physic, or his practice therein; and the first words, "Thou art a fool and an ass," are but words of scorn, and the other words touch him only in scholarship, and not in his art, and a physician may be no good scholar, and yet a good physician. And it was compared to *Buckley's Case*, for saying of an attorney that he "is a corrupt man;" unless there be conference of his profession, the action lies not.

RICHARDSON, C. J., said he was of that opinion, but he would advise. Afterwards, in Trinity term, 9 Car. I., it was adjudged for the plaintiff.<sup>1</sup>

## BILL v. NEAL.

IN THE KING'S BENCH, HILARY TERM, 1662.

Reported in 1 *Levinz's Reports*, 52.

ACTION on the case, for that the defendant saith of him, being a justice of peace, "He is a fool, an ass, a beetle-headed justice." After verdict, it was moved in arrest of judgment, that the words are not actionable, for they found only in disability and not criminally. But

<sup>1</sup> *Goddart v. Haselfoot*, 1 Vin. Abr. Act. Words, S, a, pl. 12; *Dr. Brownlow's Case*, Mar. 116; *Moises v. Thornton*, 8 T. R. 303; *Bergold v. Puchta*, 2 N. Y. Supreme Ct. R. 532, acc. Conf. *Foster v. Small*, 3 Whart. 138. — Ed.











on the other side it was said, that the words are scandalous of him, and import his unfitness to be a justice of peace, and are a cause to remove him from his office; and they cited *Peard v. Jones*,<sup>1</sup> "Dunce of a lawyer, and he will get little by the law," which were adjudged actionable. And in the same book, *Cawdry v. Highley*, words spoken of a physician, "He is a drunken fool, an ass, never was a scholar, nor fit to speak to a scholar," adjudged actionable; and here those words charge the plaintiff with indiscretion, and render him incapable of the office of a justice of peace. But it was adjudged by FOSTER, C. J., *Wyndham and Twysden v. Mallet*, that those words are not actionable, and cited *Biscoe v. Hollis*,<sup>2</sup> as a stronger case than this, and *Hammond and Kingsmill's Case* in this court,<sup>3</sup> where, for saying of a justice of peace, "He is a debauched man, and unfit to be a justice," it was adjudged no action lay; and Justice Twysden said, that words which found in disability only are not actionable, except they are spoken of one who gains his living by that thing (profession) wherein the words do disable him. MALLET held these words actionable, being spoken of a magistrate. But all agreed that the defendant deserved to be bound to his good behavior for his sauciness of a magistrate. Whereupon the counsel of the plaintiff moved immediately that he might be bound to his good behavior; but thereto the court answered that the court could not do it without a *supplicavit* first made, and before the *supplicavit* there ought to be a bill of the complaint filed. But FOSTER, C. J., said, That if any would sue to him for a warrant for the good behavior, he would grant it; but as to the action, they gave judgment for the defendant.

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### SEAMAN v. BIGG.

IN THE KING'S BENCH, MICHAELMAS TERM, 1637.

[Reported in *Croke's Charles*, 480.]

ACTION for words. Whereas the plaintiff was servant in husbandry to J. S., and was his bailiff, and in great trust with him, and thereby got his means and maintenance; that the defendant, to disgrace and discredit him with his master and others, spake of him these words, "Thou art a cozening knave, and hast cozened thy master" (*innuendo* the said J. S.) "of a bushel of barley." The defendant makes justification, and it was found against him.

*Farrar* now moved in arrest of judgment, that these words are not

<sup>1</sup> Cro. Car. 382.

<sup>2</sup> Cro. Jac. 58.

<sup>3</sup> Sty. 22, 210.

actionable; for no action lies for calling one "cozening knave," or "cheating knave."

But all the court (*absente* BRAMPSTON) held, that true it is generally an action will not lie for calling one "cozening knave," yet where the words are spoken of one who is a servant and accountant, and whose credit and maintenance depend upon his faithful dealing, and he by such disgraceful words is deprived of his livelihood and means of maintenance, there is good reason it should bear an action, that he might have recompense for loss of his credit and means. Wherefore it was adjudged for the plaintiff.<sup>1</sup>

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### DOD v. ROBINSON.

IN THE KING'S BENCH, TRINITY TERM, 1647.

[Reported in *Aleyn*, 63, s. c. *Style*, 49.]

SLANDER. The plaintiff declares that the last of March, 13 Car., he was instituted and inducted into a parsonage in Ireland, and executed the office of a pastor in that church by the space of four years after; and the defendant said of him, "He was a drunkard, a whoremaster, a common swearer, and a common liar, and hath preached false doctrine, and deserves to be degraded." And after a verdict for the plaintiff, it was moved by *Hale* in arrest of judgment, 1. That the words in themselves are not actionable, because the crimes charged impute no civil or temporal damage to the plaintiff for which he may have action. But the opinion of the court was clear for the plaintiff in that point; for that the matters charged are good cause to have him degraded, whereby he should lose his freehold, which is a temporal damage to him. Then it was objected that he did not say that he was parson when the words were spoken; to which it was answered by the court, that it should be intended he continued parson, because he had a freehold in the parsonage during his life. But it was further urged, that inasmuch as he hath laid a special time, during which he exercised the office of a pastor, it shall not be intended that he continued so longer than himself hath laid it; and of this the court doubted, but inclined for the plaintiff.<sup>2</sup>

<sup>1</sup> *Wright v. Moorhouse*, Cro. Eliz. 358; *Reignalds' Case*, Cro. Car. 563; *Connors v. Justice*, 13 I. C. L. R. 451; *Ware v. Clowney*, 24 Ala. 707; *Butler v. Howes*, 7 Cal. 87; *Anon.*, Mar. 1, acc.; *Raynolds v. Blanchett*, Freem. 275, *contra*. — ED.

<sup>2</sup> *Bishop of Norwich v. Pricket*, Cro. Eliz. 1. See *Drake v. Drake*, Sty. 363 (*Liar*); *Pope v. Ramsey*, 1 Keb. 542 (*Knave, &c.*); *Cranden v. Walden*, 8 Lev. 17 (*Liar*); *McMillan v. Birch*, 1 Binney, 178 (*Drunkenness*); *Chaddock v. Briggs*, 13 Mass. 247 (*Drunkenness*); *Demarest v. Haring*, 6 Cow. 76 (*Incontinency*), acc. — ED.









## TERRY v. HOOPER.

IN THE KING'S BENCH, MICHAELMAS TERM, 1663.

[Reported in *T. Raymond*, 86.]

THE plaintiff declares that he is a lime-burner, and gets his living by buying and selling thereof; and the defendant said of the plaintiff *in arte sua*, "John Terry is a runaway, and he is a base cheating rogue, and John Terry shall never think to bring John Webb where he is himself, and rather than so I will spend £20." On not guilty pleaded and found for the plaintiff, it was moved in arrest of judgment, because he doth not say that the defendant spoke of the trade of lime-burning, but *de arte sua* generally, and he may have another trade.

Jones, for the plaintiff. In ancient time it was the constant course in declarations to lay a *colloquium* of the plaintiff; and it was a grand doubt if it was good without it, until Smith and Ward's Case.<sup>1</sup> And there resolved *de quer'* supplies the *colloquium*. Cro. Car. 515. Words of an attorney in his profession. And lime-burner is such a profession of which he may be scandalized.

WYNDHAM, J. 1. Lime-burning is such a trade of which a man may be scandalized, and so in any lawful occupation whatsoever, for it is his livelihood. 2. The flourishes in a declaration are of no effect, but only to aggravate damages. 3. The saying here *de arte sua* are applicable to his profession; and a man may speak occasionally to the prejudice of the plaintiff without having discourse of his profession: as if two are speaking together of another, and a third person comes in and affirms a scandal of him; this is commonly the worst scandal, and therefore judgment for the plaintiff.

TWISDEN to the same intent.

KELYNG, J., for the defendant. That *de arte sua* cannot be applied to his profession of lime-burning.

HIDE, C. J., for the defendant. Buying and selling is not incident to the art of lime-burning; and he cited a case in C. B. 1655, accordingly, and because the court was divided no judgment was given.

## BAKER v. MORFUE.

IN THE KING'S BENCH, EASTER TERM, 1668.

[Reported in 1 *Siderfin*, 327.]

IN an action on the case, the plaintiff declares that he, being an attorney, and the defendant speaking of him and of his profession, said

<sup>1</sup> Cro. Jac. 673.



of him, "He hath no more law than Mr. C.'s bull." After verdict for the plaintiff it was moved in arrest of judgment, because the words were not *per se* actionable, and even if they were generally, yet they were not so here, since it is not avowed that C. has a bull. But it seemed to the court that the plaintiff should have judgment, because to say, "He hath no more law than a goose," has been adjudged actionable; and although C. has no bull, it is still a slander. *Quære*, as to saying, "He hath no more law than the man in the moon."<sup>1</sup>

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### WHARTON v. BROOK.

IN THE KING'S BENCH, EASTER TERM, 1669.

[Reported in 1 Ventris, 21.]

IN an action for words, the plaintiff declared that she was and had been a long time a midwife, and got divers gains; and that the defendant, to scandalize her in her profession, said of her, "She is an ignorant woman, and of small practice, and very unfortunate in her way: there are few that she goes to but lie desperately ill, or die under her hands."

The court held the action maintainable.

But TWISDEN said, This hath been adjudged, where one brought an action, declaring she was a school-mistress, and taught children to write and read, by which she got her livelihood; and that the defendant said of her, "She was a whore, and that J. S. kept her as his whore;" that to slander one in such a profession was not maintainable without special damage.<sup>2</sup>

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### REDMAN v. PYNE.

IN THE KING'S BENCH, MICHAELMAS TERM, 1669.

[Reported in 1 Modern Reports, 19.]

AN action upon the case was brought for speaking these words of the plaintiff, being a watchmaker: "He is a bungler, and knows not how to make a good piece of work;" but there was no *colloquium* laid of his trade.

<sup>1</sup> Martyn v. Burlings, Cro. Eliz. 589; Giddye v. Heale, Moo. 695; Palmer's Case, Ow. 17; Peard v. Jones, Cro. Car. 382; Powell v. Jones, 1 Lev. 297, acc. — Ed.

<sup>2</sup> Gyles v. Bishop, Freem. 278; Flowers' Case, Cro. Car. 211; Whitehead v. Founes, Freem. 277, acc. See Anon., Skin. 86, *contra*. — Ed.









PEMBERTON. The jury have supplied that, having found that he is a watchmaker. And it is true that words shall be taken *in mitiori sensu*; but that is when they are doubtful. *Cawdry v. Highley*.

TWISDEN, J. I remember a shoemaker brought an action against a man for saying that he was a cobbler; and though a cobbler be a trade of itself, yet it was held that the action lay, in Glyn's time.

SAUNDERS. If he had said that he could not make a good watch, it would have been known what he had meant; but the words in our case are indifferent, and perhaps had no relation to his trade. The judgment was ordered to be stayed.<sup>1</sup>

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TODD v. HASTINGS.

IN THE KING'S BENCH, HILARY TERM, 1671.

[Reported in 2 Saunders, 307.]

ACTION on the case for slanderous words. The plaintiff declares that he was of good fame and credit, and that he was a draper, and got his living by buying and selling of cloths and other merchandises, and that the defendant, intending to slander him in his good name and credit, spoke to the plaintiff these scandalous words, to wit, "You are a cheating fellow, and keep a false book, and I will prove it;" whereby the plaintiff had lost his customers, to his damage, &c. On not guilty pleaded, a verdict was found for the plaintiff, and damages assessed.

And now it was moved in arrest of judgment that the words are not actionable, because it is not averred in the declaration that the defendant at the time of speaking the words had any communication concerning the plaintiff's trade or dealing by way of buying and selling, and so it does not appear that they were spoken in relation to it, and therefore they do not touch him in his trade. And the keeping of a false book does not imply that the plaintiff had kept a false debt-book; for it may be any book which is falsely printed as well as a false shop-book; and the words "cheating fellow" do not imply that he cheated in his trade, unless the words had been spoken on a communication concerning it; for perhaps the plaintiff may be a cheating fellow at play, or gaming, or the like, and not in his dealing. And here the words being spoken generally without relation to any thing in particular, they cannot be applied to the plaintiff's trade any more than to any other thing.

And of such opinion was the whole court; and the judgment was arrested.<sup>2</sup>

<sup>1</sup> See *Fitzgerald v. Redfield*, 51 Barb. 484. — ED.

<sup>2</sup> *Godfrey v. Owen*, Poph. 148; *Anon.*, Godb. 40; *Eglinton v. Aunsell*, Godb. 88;

## NEWMAN v. KINGERBY.

IN THE KING'S BENCH, EASTER TERM, 1672.

[Reported in 2 Levinz, 49.]

A PROHIBITION was prayed and granted upon a suit in the ecclesiastical court by a parson, for calling him fool, ass, and goose, for these are only words of heat, and do not touch him in his profession.

## SOUTHAM v. ALLEN.

IN THE KING'S BENCH, MICHAELMAS TERM, 1673.

[Reported in T. Raymond, 231.]

THE plaintiff is a keeper of livery stables and an inn at the Belsavage; and the defendant had other stables for the same purpose in the same yard. A stranger comes with a wagon into the yard, and demands of the defendant which is Belsavage-Inn. The defendant replied, "This is Belsavage-Inn: deal not with the plaintiff, for he is broke, and there is neither entertainment for man nor horse;" and after verdict for the plaintiff, and great damages, judgment was given for the plaintiff after much debate.<sup>1</sup>

## WETHERHEAD v. ARMITAGE.

IN THE KING'S BENCH, MICHAELMAS TERM, 1678.

[Reported in 2 Levinz, 233.]

CASE by the plaintiff, a woman, and declares that she, *per diversos annos* (not saying *ultimos elapsos*) was skilled in dancing, and taught young women to dance, whereby she gained a livelihood; and the defendant to injure her said, "She is as much a man as I am, she got J. S. with child, she is a hermaphrodite;" by which she lost divers scholars, but

Anon., Gold. 84; Ryle's Case, Cro. Eliz. 171; Brooke's Case, Hutt. 14; Loyd v. Pearce, Cro. Jac. 424; Bray v. Hayne, Hob. 76; Bronker's Case, Godb. 284; Betts v. Trevaman, Cro. Jac. 536; Coles v. Kettle, Cro. Jac. 204; Bell v. Thatcher, Freem. 276; Harvy v. Martin, T. Ray. 75; Walmsley v. Russel, 2 Salk. 696; Savage v. Robery, 2 Salk. 694, acc. — ED.

<sup>1</sup> Nuton's Case, Freem. 25, acc. Conf. Jones v. Joice, 1 Vin. Abr. Act. Words, U, 7. — ED.











does not mention any in particular. Verdict for the plaintiff; but after divers motions, *pro* and *con.*, judgment staid; for hermaphrodite is not actionable, nor is it any scandal to her profession, for young women are taught to dance more frequently by men than women; and no special damages are laid. And therefore the court held the words not actionable in themselves, without regard to the exception of its being *diversos annos* (omitting *ultimos lapsos*).<sup>1</sup>

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### PEACOCK v. LEACH.

IN THE KING'S BENCH, HILARY TERM, 1681.

[Reported in *T. Jones*, 140.]

THE plaintiff declared *quod emendo et vendendo mercimonia uberri-  
mam sibi et familiæ acquisivit vivendi sustentationem* (without men-  
tioning any certain trade), and that the defendant said to him, and of  
him, "Thou art a pitiful beggarly-broken fellow." After verdict (on  
not guilty) for the plaintiff, an exception was taken, that it was not  
alleged that the plaintiff was of any certain trade, but not allowed.<sup>2</sup>

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### FOX v. LAPTHORNE.

IN THE KING'S BENCH, TRINITY TERM, 1681.

[Reported in *T. Jones*, 156.]

THE plaintiff declared that he was *terræ tenens* (Anglice) a renter of  
lands, and that by buying and selling *de tritico siligine hordeo, &c.*, he  
had gained *grandia lucra*, and that the defendant said of him that he  
hath cheated in corn. After verdict for the plaintiff, adjudged *quod nil  
capiat per billam*, for, *per cur.*, every common farmer is as well entitled  
to the action as the plaintiff, the words of inducement being no more  
than a description of a farmer. But by PEMBERTON, C. J., if no men-  
tion had been made of renting of lands, or if he had alleged that he  
was a badger, &c., the action perhaps would lie.<sup>3</sup>

<sup>1</sup> See *Buck v. Hersey*, 31 Me. 558. — ED.

<sup>2</sup> *Boyer v. Shale*, 1 Vin. Abr. Act. Words, U, a, 11, acc.; *Nichols v. Catsey*, 1  
Vin. Abr. Act. Words, U, a, 38; *Allen v. Swift*, 1 Vin. Abr. Act. Words, U, a, 42;  
*Cockaine v. Hopkins*, 2 Lev. 114, *semble contra*. See *Charter v. Hunter*, Hutt. 14;  
*Emerson v. —*, 1 Sid. 299; *Hill's Case*, Latch, 114; *Anon.*, Mar. 119; *Anon.*, Godb.  
40. — ED.

<sup>3</sup> *Phillips v. Phillips*, Sty. 420; *Rathbun v. Emigh*, 6 Wend. 407, acc. — ED.

## DOBSON v. THORNISTONE.

IN THE KING'S BENCH, TRINITY TERM, 1686.

[*Reported in 3 Modern Reports, 112.*]

THE plaintiff was a husbandman, who brought an action against the defendant for these words: "He owes more money than he is worth; he is run away, and is broke;" and he had a verdict.

It was moved now in arrest of judgment that the words, being spoken of a farmer, are not actionable. To say that a gentleman is "a cozeners, a bankrupt, and has got an occupation to deceive men," though he used to buy and sell, yet, being no merchant, it was the better opinion of the court that the words were not actionable. Anon.<sup>1</sup> So to say of a farmer that he is "a whoreson bankrupt rogue," and it not appearing that he got his living by buying and selling, or that the words were spoken of him relating to his occupation, it is not actionable. Phillips v. Phillips.<sup>2</sup> For it must not only appear that the plaintiff hath a trade: Hawkins v. Cutts;<sup>3</sup> but that he gets his living by it: Emmerson's Case;<sup>4</sup> otherwise the words spoken of him will not bear an action.

But the court held the words to be actionable. The like judgment was given in the case of a carpenter, in Michaelmas term, 3 Jac. II., for words, viz., "He is broke and run away."<sup>5</sup>

## CHAPMAN v. LAMPHIRE.

IN THE KING'S BENCH, HILARY TERM, 1687.

[*Reported in 3 Modern Reports, 155.*]

AN action on the case was brought for scandalous words spoken of the plaintiff, who declared that he was a carpenter, and a freeman of the city of London, and that he got great sums of money by buying of timber and materials, and by building of houses; and that the defendant, having discourse of him and of his trade, spoke these words, viz., "He is broken and run away, and will never return again." There was a verdict for the plaintiff.

A motion was now made in arrest of judgment, for that a carpenter

<sup>1</sup> Godbolt, 40.<sup>2</sup> Styles, 420.<sup>3</sup> Hutt. 49.<sup>4</sup> 1 Sid. 299.

<sup>5</sup> Phillips v. Hoeffer, 1 Pa. 62, acc.; Rathbun v. Emigh, 6 Wend. 407, *contra*. See Baine v. —, March, 115. — Ed.











was not a trade within the statute of bankrupts; and a day being given to speak to it again,

*Mr. Pollexfen*, for the plaintiff, argued that, before the statutes made against bankrupts, words spoken reflecting upon a man in his trade were actionable even at the common law, because it might be the occasion of the loss of his livelihood; and therefore it was actionable to say of a scrivener that "He is broken and run away, and dares not show his face;" and yet a scrivener was not within the statutes of bankruptcy before the act of 21 Jac. I. c. 19; therefore the action must lie at the common law, because these words disparage him in his trade.

But the counsel for the defendant said that these words were not actionable, for they do not tend to his disparagement; he may be broke, and yet as good a carpenter as before. *Fox v. Lapthorne*. The case of one *Hill*, in 2 Car. in this court, was much stronger than this; the words spoken of him were these: "Hill is a base broken rascal, and has broken twice already, and I will make him break the third time;" the plaintiff had judgment, but it was arrested. *Hill's Case*.<sup>1</sup> A carpenter builds upon the credit of other men; and so long as the words do not touch him in the skill and knowledge of his profession, they cannot injure him.

THE CHIEF JUSTICE. The credit which the defendant has in the world may be the means to support his skill, for he may not have an opportunity to show his workmanship without those materials with which he is intrusted.

The judges were divided in opinion, two against two, and so the plaintiff had his judgment, there being no rule made to stay it, so that he had his judgment upon his general rule for judgment; but if it had been upon a demurrer or special verdict, then it would have been adjourned to the Exchequer Chamber.<sup>2</sup>

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### ASTON v. BLAGRAVE.

IN THE KING'S BENCH, MICHAELMAS TERM, 1724.

[Reported in 2 Lord Raymond, 1369.]

IN an action on the case for words, the plaintiff, after the usual character of his good behavior, set out that, whereas the first of October in the fifth year of his Majesty's reign, and for many years before, he was and yet is a justice of the peace for the county of Berks, and behaved himself justly and honestly in that office; that the defendant intended

<sup>1</sup> Latch, 114.

<sup>2</sup> *Figgins v. Cogswell*, 3 M. & S. 369, acc. — Ed.

to scandalize him and bring him into disrepute, the said first of October, at Wantage, in Berks, having a discourse with divers of the king's subjects *de prefato Ricardo, et de executione sua officii sui justiciarii ad pacem predicti adtunc et ibidem in presentia et auditu quamplurimorum dicti domini regis nunc subditorum tunc ibi presentium, falso et malitiose dixit et propalavit, et alta voce publicavit, de predicto Ricardo adtunc uno justiciariorum pacis ut prefertur existente, et de executione sua officii sui predicti, hæc ficta scandalosa et defamatoria verba Anglica sequentia, viz., "Mr. Aston" (innuendo the plaintiff) "is a rascal, a villain, and a liar;" ad damnum £20. On not guilty pleaded, verdict was found for the plaintiff, and damages given £2 10s. And after several motions in arrest of judgment, that these words were not actionable, because they were general words of an uncertain signification; and words of heat only ought to be took in *mitiori sensu*, and could not be properly applied to the plaintiff as in execution of his office; for which purpose *Girdler*, Serjt., for the defendant, cited *Bill v. Neal*,<sup>1</sup> in an action for words spoke of a justice of peace, "He is a fool, an ass, and a beetle-headed justice." After verdict for the plaintiff, judgment was arrested by Foster, C. J., Windham and Twisden, JJ., contrary to the opinion of Mallet. Sir John Hollis *v. Briscow*,<sup>2</sup> "Your master is a base, rascally villain, and is neither nobleman, knight, nor gentleman, but a most villainous rascal, and by unjust means doth most villainously take other men's rights from them, and keeps a company of thieves and traitors to do mischief," &c., spoke of a justice of peace, held not actionable by three justices against two. *Price v. Devall*.<sup>3</sup> But he admitted the defendant might have been bound to his good behavior for speaking the words in the declaration. But, November 26, this term, Pratt, Ld. C. J., my brothers Powys and Fortescue, and myself, gave our opinions that the words were actionable, they being laid to have been spoken of the plaintiff in the execution of his office, and so found; so that it is the same as if the defendant had said that the plaintiff is a villain in the execution of his office, a rascal in the execution of his office, and a liar in the execution of his office; which carry with them a great scandal, and in common understanding import a great imputation against the plaintiff's integrity and behavior in that office; and therefore none of the cases cited come up to this case. And judgment was given for the plaintiff.<sup>4</sup>*

<sup>1</sup> 1 Lev. 52.<sup>2</sup> Cro. Jac. 58.<sup>3</sup> Cases in Parl. 12.<sup>4</sup> *Stuckley v. Bulhead*, 4 Rep. 16 a; *Ware v. Pawlet*, Moo. 409; *Lassels v. Lassels*, Moo. 401; *Stafford v. Powler*, Moo. 704; *Marriner v. Cotton*, Moo. 695; *Kemp v. Housgoe*, Cro. Jac. 90; *Burton v. Tokin*, Cro. Jac. 143; *Beaumont v. Hastings*, Cro. Jac. 240; *Chetwind v. Meeston*, Cro. Jac. 308; *Cæsar v. Curseny*, Cro. Eliz.









## STANTON v. SMITH.

IN THE KING'S BENCH, EASTER TERM, 1727.

[Reported in 2 Lord Raymond, 1480.]

IN an action upon the case for words, the plaintiff declared that he was a person of good name and condition, and now is, and at the time of speaking the words after mentioned, and for seven years before was, a brewer, and in that trade got his livelihood and great gains, and always paid his debts to the full without any compounding; the defendant, maliciously intending to bring the plaintiff into discredit, and to bring him into disgrace with all the king's subjects to whom he was known, the defendant, the 4th of October, 13 Geo., at, &c., spoke several false and scandalous words (mentioning them particularly in the declaration, and laying them several ways) of the plaintiff, *ad damnum* £200. The defendant, as to all the words in the declaration, except these, viz., "He is a sorry, pitiful fellow, and a rogue; he compounded his debts at five shillings in the pound," pleaded not guilty; whereupon issue was joined; and as to those words the defendant demurred, and the plaintiff joined in demurrer. *Mr. Theed*, for the defendant, argued that these words were not actionable, for there is no *colloquium* laid of his trade. He cited *Marshall v. Allen*,<sup>1</sup> "He is a base, broken rascal, and hath broken twice, and I will make him break a third time." The court seemed to be of opinion that the words were not actionable; and a rule was made for judgment for the defendant, unless cause, &c. [See the same case, *Latch.* 114, by the name of *Hill's Case*, where it is said the plaintiff had not alleged he was a tradesman, but that he was an honest subject, and got his livelihood by buying and selling only, and for that all the judges agreed that judgment should be arrested; but otherwise it had been if he had been a tradesman.] He cited also *Savage v. Robery*,<sup>2</sup> "You are a cheat, and have been a cheat divers years," spoke of a tradesman, and judgment was arrested. But we were all of opinion that such words spoke of a tradesman must greatly lessen the credit of a tradesman, and be very prejudicial to him, and therefore that they were actionable. Judgment was given for the plaintiff May 9.

305; *Blewerhasset v. Baspoole*, Cro. Eliz. 313; *Isham v. York*, Cro. Car. 15; *Masham v. Bridges*, Cro. Car. 223; *Kerle v. Osgood*, 1 Ventr. 50; *Walden v. Mitchell*, 2 Ventr. 265; *Hamond v. Kingsmill*, Sty. 210; *Rouse v. Wilcocks*, Comb. 72; *Alleston v. Moor*, Hetl. 167; *Boughton v. Bishop*, 1 And. 119; *Newton v. Stubbs*, 3 Mod. 71; *Kent v. Pocock*, 2 Stra. 1168; *Adams v. Meredew*, 3 Y. & J. 219; *Robbins v. Treadway*, 2 J. J. Marsh. 540; *Lindsey v. Smith*, 7 Johns. 359; *Hook v. Hackney*, 16 Serg. & R. 385, acc. See *Hollis v. Briscow*, Cro. Jac. 58; *Geeve v. Copshill*, Cro. Eliz. 854. — ED.

<sup>1</sup> Noy, 77.<sup>2</sup> 2 Salk. 694.



## LANCASTER v. FRENCH.

IN THE KING'S BENCH, EASTER TERM, 1728.

[Reported in 2 Strange, 797.]

THE plaintiff, being a carpenter, brought an action for these words, "He has charged Mr. Andrews for forty days' work, and received the money for the work, that might have been done in ten days, and he is a rogue for his pains." After verdict for the plaintiff the judgment was arrested, the words not being actionable.

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## HARMAN v. DELANY.

IN THE KING'S BENCH, EASTER TERM, 1731.

[Reported in 2 Strange, 898.]

IN an action upon the case for a libel, the plaintiff declared that he was gunsmith to his Royal Highness the Prince of Wales, and that it having been inserted in the "Craftsman," that he had had the honor to present him a gun of two feet six inches long, which would shoot as far as one of a foot longer, and had kissed the prince's hand on being appointed his gunsmith; the defendant, intending to scandalize him in his trade, published an advertisement in these words: "Whereas there was an account in the 'Craftsman' of John Harman, gunsmith, making guns of two feet six inches to exceed any made by others of a foot longer (with whom it is supposed he is in fee), this is to advise all gentlemen to be cautious, the said gunsmith not daring to engage with any artist in town, nor ever did make such an experiment (except out of a leather gun), as any gentleman may be satisfied of at the Cross Guns in Longacre." After not guilty pleaded, there was a verdict for the plaintiff and £50 damages.

It was moved in arrest of judgment that this is no libel, and that if one tradesman will pretend to be a greater artist than others, it is lawful for them to support their own credit in the same way.

*Et per curiam*, That is certainly so, and if the defendant had gone no further, he would not have been chargeable; they might advertise that they make as good as he, but they ought not to say he is no artist, which they plainly do by saying he dares not engage with any artist, and by advising gentlemen to be cautious of him. The law has always been very tender of the reputation of tradesmen, and therefore words spoken of them in the way of their trade will bear an action, that will









not be actionable in the case of another person; and if bare words are so, it will be stronger in the case of a libel in a public newspaper, which is so diffusive. 1 Mod. 19; 1 Roll. Abr. 63, pl. 30; Cro. Eliz. 343; 1 Roll. Abr. 62, pl. 28; Hetley, 71; Brownl. 151; 2 Mod. 118; 5 Co. 125; Hard. 470; 1 Keb. 293; 1 Roll. Abr. 37, pl. 15; Skinner, 123; Hob. 225; Mo. 627; 2 And. 40; Hutt. 125.

The plaintiff had judgment, the court being of opinion that it tended to discredit him in his business.

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### MUSGRAVE v. BOVEY.

IN THE KING'S BENCH, HILARY TERM, 1733.

[Reported in 2 *Strange*, 946.]

A PROHIBITION was granted to a suit for these words, spoken by one clergyman of another, "You are an old rogue and a rascal, and a contemptible fellow, despised and hated by everybody."<sup>1</sup>

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### DAY v. BULLER.

IN THE COMMON PLEAS, EASTER TERM, 1770.

[Reported in 3 *Wilson*, 59.]

ACTION for slandering the plaintiff in his profession of an attorney, by saying of him these words, "What, does he pretend to be a lawyer? He is no more a lawyer than the devil!" Verdict for the plaintiff. And now *Davy*, Serjt., moved in arrest of judgment, alleging that it was not actionable to say of an attorney he was no lawyer, any more than to say of an apothecary that he was no physician; that it was no more necessary for an attorney to be a lawyer than for an apothecary to be a physician. But, *per curiam*, to say of an attorney he is no lawyer, is a great reflection upon him, and means that he does not understand his business; besides, they said, an attorney must have a competent knowledge of the law, or he cannot draw a common writ or declaration. And *per YATES, J.*, the words are as great a slander upon the plaintiff, and as injurious to him, as any words possibly can be.

So the serjeant took nothing by his motion, and plaintiff had judgment.<sup>2</sup>

<sup>1</sup> See *Collins v. Harvey*, Gilb. 98; *Pocock v. Nash*, Comb. 253; *Coxeter v. Parsons*, 2 Salk. 692; *Hall v. Downes*, Com. 309. — ED.

<sup>2</sup> *Hardwick v. Chandler*, 2 Stra. 1138, acc. — ED.

## ONSLow v. HORNE.

IN THE COMMON PLEAS, EASTER TERM, 1771.

[Reported in 2 Blackstone, 750.]

CASE for a libel, and also for malicious and scandalous words spoken of the plaintiff. The libel was set forth *in hæc verba*, in four several counts. The fifth count<sup>1</sup> set forth that the plaintiff, being knight of the shire for Surry, the defendant, on the 26th of June, 1769, at Epsom, in the presence of many freeholders assembled to consider of measures to be taken in support of the right of election, when it was proposed to instruct their members to take measures on that behalf, falsely and maliciously spoke the words following: "I expected to have met George Onslow, but find he is not here; for which I am rather sorry, as I came here with an intention to have told him my opinion of him. And if he would have waived his privilege, I would have waived my gown. I know him very well. I have carried letters from Mr. Onslow to Mr. Wilkes, full of professions of friendship and service, which were never kept. Nor indeed is it to be wondered at, since it is notorious he never kept his word unless where his own interest was concerned. *As to the instructing our members to obtain redress, I am totally against that plan; for, as to instructing Mr. Onslow, we might as well instruct the winds; and should he even promise his assistance, I should not expect him to give it us.*" The sixth count charged only the words in italics, without the introductory ones. On not guilty pleaded and issue joined, the jury, at Kingston summer assizes, 1770, found their verdict for the defendant on the first four counts, and for the plaintiff on the last two with £400 damages.

In Michaelmas term, 1770, *Glyn* moved in arrest of judgment, that the words were not actionable, especially those in the sixth count; and, the verdict being taken generally on the fifth and sixth, if one fails the action is gone, and was supported by *Jephson*. *Whitaker* and *Leigh* showed cause, and the court took time to consider, till Hilary term, 1771, when De Grey, C. J., and Nares, J., being come into the court, *vice* Wilmot, C. J., who had resigned, and Bathurst, J., made Lord Chancellor, it was again argued in that term.

For the defendant it was insisted, first, that the words taken substantively, and without relation to persons or circumstances, were not actionable; second, that, if not actionable in themselves, the plaintiff's character as a member of Parliament would not make them so; third, that, if actionable in themselves, the occasion of speaking them would

<sup>1</sup> The fifth and sixth counts are inserted at length in 3 Wils. 178.











excuse them, being at a public county meeting, where freedom of debate is necessary. All which propositions were strenuously denied on the part of the plaintiff. And the cases relied on by both sides were *Harrison v. Thornborough*; <sup>1</sup> *Aston v. Blagrave*; *Clarges v. Roe*; <sup>2</sup> *How v. Prynne*; <sup>3</sup> *Pinchbeck v. Warwick*; <sup>4</sup> *Walden v. Mitchell*; <sup>5</sup> *Palmer v. Edwards*; <sup>6</sup> *Moore v. Foster*; <sup>7</sup> *Stawel v. Cawne*; <sup>8</sup> *Duval v. Price*; <sup>9</sup> *Kent v. Pocock*; <sup>10</sup> *Beavor v. Hides*. The court took time to consider till the second day of this term; and then

DE GREY, C. J., delivered the opinion of himself, GOULD, BLACKSTONE, and NARES, JJ. It is in vain to inquire whether the fifth count can be maintained unless the sixth can. For, as a declaration may consist of many counts, so damages may be given either jointly or distinctly. But if they be given generally and jointly, then if one count fails, the whole is at an end; for some of the damages shall be construed to be given on every count. *Dyer*, 369 *b*; 5 Co. 108 *a*; 10 Co. 130 *a*; 1 Roll. Abr. 576. If words actionable and not actionable are laid in the same count, the damages shall be applied to those words which are actionable. 10 Co. 131. But it is otherwise when insufficient words are laid in a count by themselves. As, therefore, we think the action cannot be maintained on the second count, we give no opinion with respect to the first. And as we think the words in the last count are not actionable, either in themselves, or as applied to a member of Parliament, we shall give no opinion how far such an occasion as the meeting stated in the declaration would or would not justify speaking such words as would otherwise be clearly actionable.

The grand consideration for the court at present is, whether the words laid in the last count will support an action. There are two general rules for determining whether words are actionable. 1. The imputation of crimes which would make the party obnoxious to punishment. Yet here there must be precision in the charge. A general charge of wickedness, &c., would not be sufficient. And the punishment to be incurred must not be light or trivial. Mere imprisonment only will not be always sufficient. *Ogden v. Turner*, per Holt, C. J. Though he, perhaps, goes rather too far. 1 Roll. Abr. 46; *Finch, Law*, 135, show that his principle is too general. But the present case certainly does not fall under this head. 2. The other gen-

<sup>1</sup> 10 Mod. 196.

<sup>2</sup> 3 Lev. 30; 3 Mod. 26; *Skin*n. 88; *Raym.* 482.

<sup>3</sup> 2 Salk. 694; 1 Roll. Abr. 56, pl. 29; *Cro. Eliz.* 306, 433.

<sup>4</sup> 1 Roll. Abr. 57 <sup>5</sup> 2 Vent. 265.

<sup>6</sup> M. 13 Geo. II. *Coke's Notes*, 160; *Cro. Jac.* 339, 619.

<sup>7</sup> *Cro. Jac.* 65; *Yelv.* 62.

<sup>8</sup> 3 Lev. 50; 1 Roll. Abr. 43, 44, 45.

<sup>9</sup> *Show. P. C.* 12.

<sup>10</sup> *Stra.* 1168.

eral rule is, if the words may be of probable ill consequence to a person in a trade, a profession, or an office; such as the cases of *Kent v. Pocock* and *Aston v. Blagrove*. A distinction was made at the bar between offices of credit and of profit: that words which affect the latter may be actionable; but not so if they only affect the former. We do not now give our sanction to this distinction in the latitude contended for by the counsel. In *How v. Prinn*, Lord Holt acquiesced in it only where the words conveyed a charge of ignorance, not of dishonesty. And *Mar. 82, 2 Vent. 266*, seem to hold a contrary doctrine. In *Duval v. Price*, whatever might induce the House of Lords to determine that case (which does not appear), the judges thought it was actionable to say of a justice of peace that he was disaffected to the government. Neither do we give any opinion how far opprobrious words spoken of men in office are actionable. Some may be and others not. The cases of imputation of popery (2 *Vent. 265*; *Salk. 696*) class by themselves. The circumstances of the times, perhaps, influenced the opinion of the court. But mere opprobrious words, which subject to no punishment or temporary loss, do not seem to be actionable when spoken of men in office. No imputation of the breach of legal or moral obligation, unless enforced by temporal sanctions; no charge of the want of chastity, unless under special circumstances (1 *Lev. 134*), — will be sufficient to found an action.

The length of argument, and the many cases cited, has made it necessary to distinguish with accuracy what we do not determine. What we do determine will fall within a narrow compass. We conceive that the words laid in the last count amount only to a charge of insincerity, and that only in the opinion of the speaker. For, as to his disregarding the instructions of that meeting, it might (for any thing that appears to us) be upon laudable motives, as well as culpable ones. He might differ from them in judgment without any imputation of blame. The only charge is want of sincerity, and such a charge is not a sufficient ground to maintain this action.

*Judgment arrested per totam curiam.*

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## ANONYMOUS.

IN THE KING'S BENCH, MICHAELMAS TERM, 1772.

[*Reported in Loft, 322.*]

DECLARATION stated, that whereas the plaintiff is a wool-comber, and a person had agreed with him for a certain quantity of wool, the defendant well knowing of the premises, and in order to bring him











into discredit with persons buying and selling with him, and deprive him of his livelihood, spoke the words laid in the declaration: "He" (*innuendo* the plaintiff) "is not worth a penny, and he will run away."

2 Shower's Reports, cited, "He is an idle rascal, and not worth a groat;" actionable if spoken of a trader. Rolle's Abridgment, in the very case of a wool-comber, "Buy no more wool of him, for he is not worth a penny."

It was said as to the averment, it was sufficiently averred for the court to see that the plaintiff was a wool-comber, and got his money by buying and selling in that trade; as in the case in Brownlow's Reports, plaintiff states, that whereas he is a judge, defendant not being ignorant of the premises: held a good averment.

*Davy*, Serjt., e contra, that the words were not actionable; for that wherever a man not necessarily lives upon his trade, or so as to be liable to the statutes of bankruptcy, slander lies not for saying, "he is not worth a groat."

*Chapman v. Lamphire*. A carpenter describes himself to be such, and then states that he got much money by buying of timber and materials, and building of houses, and that the defendant spoke of him as follows, "He is broken and run away, and will never return again," which is much the same as stated here, and the judges were divided, two against two, whether these words were actionable or not. *Anderson v. Fairfax*.

Action lies not for such words spoken of a farmer, unless he declares specially that he gets his living by buying and selling. They would not be actionable if said of a vintner, nor of a shoemaker (this last the court denied), because not liable to the bankrupt laws. In the case, 2 Shower, 295, the words were spoken of a weaver; and the case stated specially that he got his living by buying and selling. It is not sufficiently stated here that anybody traded with him, or he with anybody.

The court thought otherwise; and that a wool-comber, not stated to be a laborer, must of necessity be intended to buy wool to work with. A farmer, the court observed, was no trade at all; which must have been the reason of the decision cited above.

The court further said, that they would not disturb the case, especially after verdict.<sup>1</sup>

<sup>6</sup> Anon., 1 Bulst. 40 (*Grazier*); *Stanley v. Osbaston*, Cro. El. 268 (*Shoemaker*); *Ellis v. Hunt*, 1 Vin. Abr. Act. Words, U, a, 8 (*Shoemaker*); *Collis v. Malin*, W. Jones, 304 (*Drover*); *Lewis v. Hawley*, 2 Day, 495 (*Drover*); *Calkins v. Wheaton*, 1 Edm. Sel. Cas. 226 (*Drover*); *Ostrom v. Calkins*, 5 Wend. 263 (*Distiller*); *Delaporte v. Cook*, 1 Vin. Abr. Act. Words, U, a, 4 (*Weaver*); *Best v. Loit*, 1 Vin. Abr. Act. Words, U, a, 6 (*Scrivener*), acc. — Ed.

## HARRISON v. STRATTON,

AT NISI PRIUS, CORAM LORD ELLENBOROUGH, C. J., NOVEMBER 30,  
1802.

[*Reported in 4 Espinasse, 218.*]

THIS was an action for slanderous words. Plea of not guilty.

The plaintiff was a surveyor, and the defendant a tinman and brazier.

The defendant had set up a hot kitchen, with the other apparatus, for a Mr. Angerstein, for which he had charged £90. The payment had been disputed, as being a considerable overcharge. The defendant brought an action to recover the amount, and the cause was tried at Guildhall.

Harrison, the present plaintiff, had been employed by Mr. Angerstein as a surveyor, to estimate the value, in order to ascertain how much ought to be paid, and to give evidence at the trial, as a witness, of the value he put on the work, which was £60. The cause was tried, and the plaintiff was examined as a witness on behalf of Mr. Angerstein. The defendant recovered £90, being the whole of his demand.

The defendant afterwards speaking of Harrison, said, "Harrison is a scoundrel. If I would have found him an oven for nothing, and had given him after the rate of £20 per cent upon the amount of the charges for the work and materials, he would have passed my account."

These were the words laid in the declaration, as imputing dishonesty in the plaintiff in the course of his business and profession as a surveyor.

The first witness called for the plaintiff proved the words, "Harrison is a scoundrel; and if I had allowed £20 per cent, he would have passed my account." The second witness proved the words, "Harrison is a scoundrel; and if I had deducted £20 per cent, he would have passed my account." These were the only witnesses called by the plaintiff.

Upon those words being so proved, LORD ELLENBOROUGH said, He thought the plaintiff must be called. He said, that on the face of the record, the words seemed to him to be scarcely actionable; they imputed rather an inclination to the plaintiff to do that which was wrong, than the actual doing of it; and that imputing evil inclinations to a man, which were never brought into action, was not actionable. Words to be actionable should be unequivocally so, and be proved as laid; but that as the words were proved, they did not support the









declaration. The words of the declaration were, "If he would give me £20 per cent;" that might mean something to himself, by which he would be himself benefited, to the prejudice of his employer; but the words proved were, "If he would allow, or if he would deduct, £20 per cent." These words might import an allowance or deduction from the plaintiff's bill, for the benefit of his employer; and were of a different meaning and import.

*The plaintiff was nonsuited.*

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### HUNT v. BELL.

IN THE COMMON PLEAS, JUNE 8, 1822.

[Reported in 1 Bingham, 1.]

THIS was an action on the case for a libel against the plaintiff, in regard to his conduct as proprietor of a building called the Tennis-court, which, the declaration stated, he had himself appropriated, and had permitted others (for money therefor paid to him) to appropriate, for (amongst other lawful purposes) the exhibiting from time to time therein of sportive and amicable contests, or matches in the art of pugilism, or boxing with padded gloves, commonly called sparring, by and between persons skilled in such art, for the amusement of any persons desirous of being spectators thereof, and paying for their admission into such building a certain sum of money per head.

The general issue was pleaded. At the trial before Dallas, C. J., Middlesex sittings after Easter term last, the above statement as to the nature of the exhibitions at the Tennis-court was fully made out, and also, that those exhibitions, consisting of sparring, chiefly by professors of pugilistic science, had always been conducted in the most orderly manner. There was no evidence that they were designed as a training or preparation for regular prize-fighting. The publication of the matter complained of was admitted by the defendant, and it appeared to be clearly libellous; but the defence was, that the purpose to which the plaintiff had appropriated the Tennis-court was illegal, as being, if not an absolute training for, preparatory to and promotive of, regular prize-fighting; and the preamble of the statute 25 Geo. II. c. 36, § 2, was referred to, as indicative of the views entertained by the legislature on such matters.

DALLAS, C. J., first put it to the jury to consider whether the plaintiff's exhibitions were not illegal as tending to form prize-fighters, declaring such to be his opinion at the moment, although he was



unwilling to decide the point without further time for deliberation, and he then recommended the jury to find a verdict for the plaintiff, which the defendant might afterwards move to set aside, and so fully discuss the question; but the jury found a verdict for the defendant. Whereupon

*Bosanquet*, Serjt., now moved for a new trial on the following grounds: The verdict was given under the supposition that the plaintiff's vocation was illegal; but there was no evidence that his exhibitions were designed as a training or preparation for regular prize-fighting; and a mere exercise of pugilistic skill, divested of violence by the use of padded gloves, is not illegal, such exercise being not only unaccompanied with breach of the peace or danger, but being highly beneficial as promotive of bodily strength and agility, and as furnishing means of defence against unprovoked attacks. Prize-fighting has always been interrupted and repressed by the magistrates, but they have never interfered to prevent exhibitions of sparring, as they must have done if such exhibitions had been unlawful; and this is the first time the legality of them has been questioned. If it be unlawful in the way of exhibition, or otherwise, to give and receive instruction in the art of pugilistic attack and defence, those instructions being unaccompanied with violence or danger except from accidents, which might equally occur in tennis, cricket, or other games, *a fortiori* must all instruction or practice in fencing, broad-sword exercise, or archery, be illegal; yet exhibitions of, and practice in the two former, have never been interrupted, though publicly carried on. There are numerous enactments for the encouragement of archery; and in *Rex v. Handy*,<sup>1</sup> Lord Kenyon must be taken to have spoken of fencing as not illegal. The price demanded for admission would prevent exhibitions of this kind from occasioning idleness in the poorer classes of society; though if it were otherwise, Lord Coke says,<sup>2</sup> "When King Edward III., in the 39th year of his reign, commanded the exercise of archery and artillery, and prohibited the exercise of casting stones and bars, and the hand and foot balls, cock-fighting, *et alios vanos ludos*, yet no effect thereof followed till divers of them were prohibited upon a penalty by divers acts of Parliament." But there is no act of Parliament which forbids sparring exhibitions, and they do not fall even within the preamble of 25 Geo. II. c. 36, § 2. Stage representations they cannot be called, with more propriety than the feats of tumblers, which latter have been holden not to be stage representations within that act. *Rex v. Handy*.

DALLAS, C. J. When this cause was tried, I certainly delivered an

<sup>1</sup> 6 T. R. 286.

<sup>2</sup> 11 Rep. 87, case of Monopolies.









opinion, such as I could form at the moment, and under some difficulty; for I think there may be difficulty in this question, and I have wished for further time to consider it. Without going into matters foreign to the point under discussion, we know that, in the early periods of their history, it has been the practice of all civilized nations to train up their population to exercises of activity and courage; and, with a view to national defence, to promote emulation in amicable contests of strength. I stated to the jury the difficulty of distinguishing between fencing and boxing. Many persons now present can recollect the exhibitions of skill by Angelo, Roland, St. George, and others; and yet, is not fencing the art of attack as well as of defence, and is it not more dangerous than boxing? But is fencing illegal? or is it illegal to attend a fencing-school? is it illegal to practise the bow and arrow? are archery meetings illegal? On all these views of the subject I felt considerable difficulty. But, on the whole, when I consider that these sparring exhibitions are conducted by professors of pugilism; that they are meetings which may tend to encourage an illegal vocation, and to form prize-fighters, — I see no reason for disturbing the present verdict.

PARK, J. If it were necessary for us to decide whether exhibitions, such as those in which the plaintiff was engaged, are illegal, I should wish for more time before I came to a conclusion, because exercises of such a kind have long existed. The argument drawn from the supposed legality of fencing exhibitions would be stronger in favor of sparring exhibitions, if persons who learned fencing were trained to prize-fighting, as pugilists notoriously are: but such is not the case; and it having been put to the jury whether the plaintiff's exhibitions did not tend to form prize-fighters, I see no reason for disturbing the verdict.

BURROUGH, J. I am of opinion that the practice in question is illegal. The chief object for which persons attend these exhibitions is to see and judge of the comparative strength and skill of parties, who may be afterwards matched as prize-fighters, and that, frequently, to the loss of life; for there can be no doubt that the skill acquired in these schools enables the combatants to destroy life, in some instances by a single blow; and it is notorious that persons assembled at these exhibitions engage in illegal bets on the issue of such encounters.

RICHARDSON, J. If the question were merely whether it is lawful or unlawful for persons to learn the art of self-defence, whether with artificial weapons or such only as nature affords, there can be no doubt that the pursuit of such an object is lawful; but public prize-fighting is unlawful, and any thing which tends to train up persons for such a practice, or to promote the pursuit of it, must also be unlawful. The

jury have found that the exhibitions in question have such a tendency, and I see no reason for disturbing their verdict.

*Rule refused.*<sup>1</sup>

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THOMAS v. JACKSON.

IN THE COMMON PLEAS, MAY 14, 1825.

[Reported in 3 Bingham, 104.]

THE declaration stated that the defendant was a husbandman, and farmer of a certain large farm of arable and other lands, with the appurtenances, and a vendor of the corn by him raised and grown in and upon his said farm and lands, and carried on the business of a husbandman and vendor of corn with great integrity, and with the good opinion of his neighbors and other good subjects; and that the defendant slandered him by saying to him and of him, as such husbandman, farmer, and vendor of corn, in the presence and hearing of others, "You are a rogue and a swindling rascal; you delivered me one hundred bushels of oats worse by sixpence a bushel than I bargained for;" whereupon one Marr, who, before the speaking of the words, was about to make a purchase of the plaintiff, refused to do so. The defendant pleaded the general issue, and justified the charge of selling oats sixpence a bushel worse than those bargained for.

At the trial before Bayley, J., last York assizes, the plaintiff proved the speaking of the words as alleged in the declaration, but failed in establishing the existence of the special damage.

Whereupon the learned judge told the jury that, unless special damage was proved, the action could not be maintained; and that therefore they must find a verdict for the defendant. But, in order to save the parties the expense of coming to trial again, in case the court above should dissent from his direction touching the special damage, they might also say what damage they thought the plaintiff had sustained by the speaking of the words only.

The jury found a verdict for the defendant, and said they could find no damages for the plaintiff, "because he had not substantiated the charge."

*Bosanquet*, Serjt., obtained a rule *nisi* to set aside this verdict and enter a verdict for the plaintiff, or to allow him a new trial, on the

<sup>1</sup> See *Morris v. Langdale*, 2 B. & P. 284; *Yrissarri v. Clement*, 3 Bing. 440; *Manning v. Clement*, 7 Bing. 362; *Johnson v. Simonton*, 43 Cal. 242, acc. See *Spall v. Mersey*, 2 Stark. 159; *Greville v. Chepman*, 5 Q. B. 781. — ED.











ground that the words alleged in the declaration, having been spoken of the plaintiff in his business or calling of a corn vendor, were actionable, and entitled him to a verdict without proof of special damage.

*Vaughan*, Serjt., showed cause; but

THE COURT were clearly of opinion that these words spoken of a corn-factor were actionable, without proof of special damage; and BEST, C. J., said, that such would be the case with any words which imputed to a man fraudulent conduct in the business whereby he gained his bread.

The rule, therefore, for a new trial was made absolute, unless the defendant consented within a week to allow a verdict to be entered for the plaintiff with 40s. damages.<sup>1</sup>

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## WHITTINGTON *v.* GLADWIN.

IN THE KING'S BENCH, HILARY TERM, 1826.

[Reported in 5 *Barnewall & Cresswell*, 180.]

DECLARATION stated that the plaintiff was an inn and tavern keeper, and carried on that trade and business with integrity, &c., always punctually paying and discharging his just debts; by means whereof plaintiff had acquired and was honestly acquiring great gains and profits in his said trade and business; yet defendant, well knowing, &c., spoke of and concerning the plaintiff in the way of his said trade and business the following words: "You have been a pauper ever since you have lived in the parish; you are now a pauper. I have paid £20 a year towards your maintenance; you will be in the bank-

<sup>1</sup> *Wolverston v. Meres*, Cro. Eliz. 911; *Dawe v. Palmer*, Hutt. 124; *Selby v. Carrier*, Cro. Jac. 345; *Blunden v. Eustace*, Cro. Jac. 504; s. c. 2 Roll. R. 72; *Ireland v. Lockwood*, Cro. Car. 570; *Crawfoot v. Dale*, 1 Ventr. 263; *Viccary v. Barnes*, Sty. 217; *Reeve v. Holgate*, 2 Lev. 62; *Davies v. Jones*, T. Ray. 62; *Read v. Hudson*, Ray. 610; *Burnet v. Wells*, 12 Mod. 420; *Anon.*, Mar. 8; *Langley v. Colson*, Godb. 151; *Fothergill v. Jackson*, Gilb. 314; *Nuton's Case*, Freem. 25; *Davis v. Lewis*, 7 T. R. 17; *Wood v. Brown*, 6 Taunt. 169; *Anon.*, 1 Bulst. 40; *Nichols v. Catsey*, 2 Bulst. 262; *Bryant v. Loxton*, 11 Moo. 344; *Griffiths v. Lewis*, 8 Q. B. 841; *Simpsey v. Levy*, 2 Jur. 776; *Beardsley v. Tappan*, 1 Blatchf. C. C. 588; *Obaugh v. Finn*, 4 Ark. 110; *Ware v. Clownoy*, 24 Ala. 707; *Butler v. Howes*, 7 Cal. 87; *Prettyman v. Shockley*, 4 Harringt. 112; *Nelson v. Borchenius*, 52 Ill. 236; *Orr v. Skofield*, 56 Me. 483; *Gay v. Homer*, 13 Pick. 535; *Odiorne v. Bacon*, 6 Cush. 185; *Joraleman v. Pomeroy*, 2 Zab. 271; *Backus v. Richardson*, 5 Johns. 476; *Burtch v. Nickerson*, 17 Johns. 217; *Brown v. Orvis*, 6 How. Pr. 376; *Herr v. Bamberg*, 10 How. Pr. 128; *Fowler v. Bowen*, 30 N. Y. 20; *Davis v. Davis*, 1 N. & McC. 290; *Hoyle v. Young*, 1 Wash. 150, acc.; *Broke's Case*, Moo. 409, *contra*. — ED.

rupt list in less than twelve months." The plaintiff having obtained a verdict,

*Marryat* now moved in arrest of judgment, on the ground that the words, at the time when they were spoken, were not actionable, inasmuch as an innkeeper was not then liable to the bankrupt laws. He cited *Collis v. Malin*; <sup>1</sup> *Smedley v. Heath*; <sup>2</sup> and *Viner's Abr. tit. Action for Words, U, α, pl. 18*, in margin, where it is said by Wray, C. J., that to call a man a bankrupt generally is not actionable; but to call a merchant so is actionable.

ABBOTT, C. J. The plaintiff's right of action in this case is founded on the principle that the words alleged in the declaration are injurious to him in his special character of an innkeeper. The single question, therefore, is, whether words imputing an inability to pay debts be injurious to a person who seeks his living by buying provisions upon credit and selling them again to his guests at a profit, he not being liable to the bankrupt laws. Now such an imputation is calculated to prevent him from having that credit which is at least useful, if not necessary, in his business; the words, therefore, are likely to be injurious to him. In *Southam v. Allen*, the following words spoken of an innkeeper were held, after verdict and much debate, to be actionable: "Deal not with the plaintiff, for he is broke, and there is neither entertainment for man nor horse." According to all the principles upon which such an action for slander is maintainable, and upon that authority, I am of opinion that this action is well brought.

BAYLEY, J. *Read v. Hudson* <sup>3</sup> is an authority to show that words imputing to a tradesman insolvency and not bankruptcy, are actionable. There, the words were spoken of a laceman, but it was not averred that he was subject to the bankrupt laws.

*Rule refused.*<sup>4</sup>

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## LUMBY v. ALLDAY.

IN THE EXCHEQUER, HILARY TERM, 1831.

[Reported in 1 *Crompton & Jervis*, 301.]

ACTION for words. The first count of the declaration, after the usual inducement of the plaintiff's good conduct, stated that, before the time of the speaking and publishing the several false, scandalous, malicious, and defamatory words by the defendant, the plaintiff was, and from thence hitherto had been and still was, clerk to a certain incorporated

<sup>1</sup> Cro. Car. 282.

<sup>2</sup> 1 Lev. 250.

<sup>3</sup> 1 Ld. Raym. 610.

<sup>4</sup> Conf. *Alexander v. Angle*, 1 Cr. & J. 143. — ED.











company, to wit, the Birmingham and Staffordshire Gas Light Company, and as such clerk had always behaved and conducted himself with great diligence, industry, and propriety, by means whereof he was acquiring gain and profits, &c.; yet, defendant intending, &c., and to cause it to be believed by the neighbors and subjects, and the persons composing the said company, that the said plaintiff was of a bad character, and unfit for his situation of clerk to the said Birmingham and Staffordshire Gas Light Company, and an improper person to be employed by the said company, and to cause him to be deprived of and lose his situation, &c., to wit, on, &c., at, &c., in a certain discourse which the said defendant then and there had with the said plaintiff, of and concerning the said plaintiff, and of and concerning the premises, in the presence and hearing of divers good and worthy subjects of this realm, then and there, in the presence and hearing of the said last-mentioned subjects, falsely and maliciously spoke and published to, and of and concerning the said plaintiff, and of and concerning the premises, these false, scandalous, malicious, and defamatory words following (that is to say): “You” (meaning the said plaintiff) “are a fellow, a disgrace to the town, unfit to hold your” (then and there meaning the said plaintiff’s) “situation” (then and there meaning the said situation of clerk to the Birmingham and Staffordshire Gas Light Company), “for your conduct with whores. I will have you in the ‘Argus,’ “You” (then and there meaning the said plaintiff) “have bought up all the copies of the ‘Argus,’ knowing you” (then and there meaning the said plaintiff) “have been exposed. You may drown yourself, for you” (then and there meaning the said plaintiff) “are not fit to live, and are a disgrace to the situation you” (then and there meaning the said plaintiff) “hold” (then and there meaning the said situation of clerk to the Birmingham and Staffordshire Gas Light Company). Plea: Not guilty.

At the trial, before Alexander, Ld. C. B., at the last assizes for the county of Warwick, the plaintiff proved the material part of the words charged in the first count. The counsel for the defendant submitted that the words were not actionable, and that the plaintiff ought to be nonsuited. The learned judge refused to nonsuit the plaintiff, and told the jury that, if they thought the words might probably have occasioned the loss of the plaintiff’s situation, to find a verdict for the plaintiff; and the jury having found a verdict for the plaintiff, he gave the defendant leave to move to enter a nonsuit.

*Adams*, Serjt., in Michaelmas term last, obtained a rule to set aside the verdict, and to enter a nonsuit; against which

*Goulburn*, Serjt., showed cause. The rule is, that words which may probably occasion the loss of the plaintiff’s situation are actionable,

where the situation is one of profit. This was laid down by De Grey, C. J., in *Onslow v. Horne*, and is in accordance with the direction of the Lord Chief Baron at the trial. Mr. Starkie, adopting this rule, observes that "words are actionable which directly tend to the prejudice of any one in his office, profession, trade, or business." 1 Starkie Sl. 117. And in another passage he adds, "When his office is lucrative, words which reflect upon the integrity or capacity of the plaintiff render his tenure precarious, and are, therefore, *pro tanto*, a detriment in a pecuniary point of view." 1 Starkie, Sl. 118. Now the plaintiff was proved to hold a lucrative office, and imputations which would put that office in jeopardy come within the rule upon this subject; at all events, the objection, if good, is upon the record; and, as all the material words were proved, there was no ground for entering a nonsuit at the trial; and therefore this rule must be discharged.

*Adams*, Serjt., *contra*. In an action for words, the plaintiff must be nonsuited if the words are not actionable, for the jury cannot assess the damages when there is no cause of action.

[BAYLEY, B. The rule is, that, if the facts alleged in the declaration be proved, it is the duty of the jury to find for the plaintiff; and if those facts do not disclose a sufficient cause of action, the defendant must move in arrest of judgment. Where a defendant is satisfied that the allegations if proved do not establish a cause of action, he ought to demur. The judge is not at liberty to nonsuit on the ground that the facts alleged in the declaration do not amount to a cause of action.]

It cannot be contended that the words are actionable *per se*; and they are clearly not actionable as spoken with reference to the plaintiff's situation. The imputation does not affect him in his situation of clerk, and are equally actionable whether they were spoken of the plaintiff in his situation or in his private capacity. Words, to be actionable by reason of an imputation upon the plaintiff's trade, must be spoken of him in his trade, and with reference to his trade. They must either impute some misconduct in his trade, which renders him unfit for his situation, or be calculated to injure him in his trade. It is consistent with this imputation that the plaintiff might have conducted himself honestly to the company, and have faithfully and efficiently performed his duty; and therefore the words cannot be actionable as spoken of the plaintiff in his trade.

*Cur. adv. vult.*

The judgment of the court was now delivered by

BAYLEY, B. This case came before the court upon a rule *nisi* to enter a nonsuit. The ground of motion was that the words (in slander) proved upon the trial were not actionable.

Two points were discussed upon the motion: one, whether the words were actionable or not; and the other, whether this was properly a ground of nonsuit.









The declaration stated that the plaintiff was clerk to an incorporated company, called the Birmingham and Staffordshire Gas Light Company, and had behaved himself as such with great propriety, and thereby acquired, and was daily acquiring, great gains; but that the defendant, to cause it to be believed that he was unfit to hold his situation, and an improper person to be employed by the company, and to cause him to be deprived of his situation, spoke the words complained of in the declaration.

The objection to maintaining an action upon these words is, that it is only on the ground of the plaintiff being clerk to the company that they can be actionable; that it is not alleged that they are spoken of him in reference to his character or conduct as clerk; that they do not, from their tenor, import that they were spoken with any such reference; that they do not impute to him the want of any qualification such as a clerk ought to have, or any misconduct which would make him unfit to discharge faithfully and correctly all the duties of such a clerk.

The plaintiff relied on the rule laid down by De Grey, C. J., in *Onslow v. Horne*, "that words are actionable when spoken of one in an office of profit, which may probably occasion the loss of his office; or when spoken of persons touching their respective professions, trades, and business, and do or may probably tend to their damage." The same case occurs in *Sir Wm. Bl. Rep.* 753, and there the rule is expressed to be, "if the words be of probable ill consequence to a person in a trade or profession, or an office."

The objection to the rule, as expressed in both reports, appears to me to be, that the words "probably" and "probable" are too indefinite and loose, and unless they are considered as equivalent to "having a natural tendency to," and are confined within the limits, I have expressed in stating the defendant's objections, of showing the want of some necessary qualification, or some misconduct in the office, it goes beyond what the authorities warrant.

Every authority which I have been able to find, either shows the want of some general requisite, as honesty, capacity, fidelity, &c., or connects the imputation with the plaintiff's office, trade, or business. As at present advised, therefore, I am of opinion that the charge proved in this case is not actionable, because the imputation it contains does not imply the want of any of those qualities which a clerk ought to possess, and because the imputation has no reference to his conduct as clerk. I say as at present advised, for the reason which I am about to state.

The next question is, whether this is properly a ground of nonsuit; and I am of opinion that, under the circumstances of this case, it is not. The words proved are nearly all the words which the first count con-



tains; and if the words proved are not actionable, none of the other words contained in that count are. When the general issue is pleaded to a count, it puts in issue to be tried by the jury the question, whether the facts stated in that count exist. The legal effect of those facts, whether they constitute a cause of action or not, is not properly in question. The proper mode to bring that legal effect into consideration is, before trial, to demur; after trial, to move in arrest of judgment. The duty of the judge, under whose direction the jury try questions of fact, is not to consider whether the facts charged give a ground of action, but to assist the jury in matters of law, which may arise upon the trial of those facts.

As the defendant, therefore, in this case puts in issue the allegations in the declaration, and those allegations were proved upon the trial, we are of opinion that the rule for a nonsuit ought to be discharged; and, notwithstanding the lapse of time, that there ought to be a rule *nisi* to arrest the judgment, if the defendant be advised to take such rule.

*Rule discharged.*<sup>1</sup>

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### AYRE v. CRAVEN.

IN THE KING'S BENCH, MICHAELMAS TERM, 1834.

[Reported in 2 *Adolphus & Ellis*, 2.]

**ACTION** for slander. The declaration contained four counts, of which the third only was proved at the trial. The inducement to the first count stated, that the plaintiff exercised and carried on the profession of a physician at H., and that before, and at the time, &c., there was a rumor and report in and about H., and the neighborhood thereof, that a physician residing at H. had been criminally connected with a married woman, and had been and was guilty of adultery. The third count charged, that in a discourse had in the hearing of divers, &c., and particularly J. B. and C. H. P., of and concerning the said plaintiff, so carrying on the said profession as aforesaid, and of and concerning the said rumor and report, the defendant, falsely and maliciously contriving and intending to have it believed that the plaintiff had been guilty of a criminal connection with a married woman, in the

<sup>1</sup> *Alexander v. Angle*, 1 Cr. & J. 143; *Sibley v. Tomlins*, 4 Tyrwh. 90; *Doyley v. Roberts*, 3 B. N. C. 835; *Brayne v. Cooper*, 5 M. & W. 249; *James v. Brook*, 9 Q. B. 7; *Hogg v. Dorrah*, 2 Porter (Ala.), 212; *Oram v. Franklin*, 5 Blackf. 42; *Buck v. Hersey*, 31 Me. 558; *Oakley v. Farrington*, 1 Johns. Cas. 129; *Van Tassel v. Capron*, 1 Den. 250; *Ireland v. McGarvish*, 1 Sandf. 155, acc. *Conf. Ware v. Clowney*, 24 Ala. 707; *Butler v. Howes*, 7 Cal. 87; *Fowles v. Bowen*, 30 N. Y. 20. — ED.









presence, &c., spoke and published the several false, &c., words following, of and concerning the said plaintiff, so carrying on such profession as aforesaid, and of and concerning him in his said profession, and of and concerning the said rumor and report, that is to say, "Have you heard that it is out who are the parties in the *crim. con.* affair that has been so long talked about?" (meaning the said rumor and report that a physician at H. had been criminally connected with a married woman). And the said C. H. P. demanded who it was; and the said defendant falsely, &c., answered, "Dr. Ayre" (meaning that the said plaintiff had been guilty of a criminal connection with a married woman, and that he was the person alluded to in such rumor and report). By means of the committing, &c., the said plaintiff has been greatly injured, &c. Here followed a statement that divers persons, not named, had refused to have acquaintance with the plaintiff, or to have any transactions with him in the way of his said profession, as they were before accustomed to have, and otherwise would have had. On the trial before Taunton, J., at the York spring assizes, in this year, a verdict was found for the plaintiff on the above count.

In Easter term last, Alexander obtained a rule calling on the plaintiff to show cause why the judgment should not be arrested. In Trinity term last (June 10th),

*F. Pollock, Wightman, and Raines*, showed cause.<sup>1</sup> An action lies for imputing adultery to a medical man, such imputation being made concerning him in his profession. It directly injures him in his profession, which is the only safe criterion that can be suggested, and which will be found to agree with the decisions. Thus, it is not actionable to say of a counsellor, "he has no more wit than a jack-anapes," but it is actionable to say of him, "he has no more law than a jackanapes;"<sup>2</sup> the reason of which distinction evidently is, that wit is not, but that knowledge of law is, essential to the profession of a counsellor. The cases are collected in Comyns's Digest, Action upon the Case for Defamation, D, 13 to D, 27, and F, 8 to F, 10, and the same principle will be found to prevail in them. It cannot be contended that an imputation of unchastity may not be so applied to a physician, as to render it highly improbable that he should be treated with that confidence which is essential to his practice. The words may be supposed to have been spoken of him so as to convey an imputation that, by taking advantage of the access allowed him to a female patient, he had intrigued with her; and after verdict, the charge set forth in the declaration may be interpreted in any way not inconsistent with the words.

<sup>1</sup> Before Lord Denman, C. J., Littledale, Taunton, and Williams, JJ.

<sup>2</sup> *Perr Cur.*, in Cawdrey and Tetley's Case, Godb. 441, citing Palmer's Case (*Palmer v. Boyer*), Cro. Eliz. 342.

*Alexander and Follett* (with whom was *R. Hildyard*), contra. In the introductory part of the complaint, the discourse is not said to have been of and concerning the plaintiff in his profession, but simply of and concerning the said plaintiff so carrying on the said profession, which are mere words of description. It may be doubtful whether this do not limit the effect of the whole allegation, so as to prevent the plaintiff from calling in aid the averment which occurs afterwards, applying the words spoken to the plaintiff, of and concerning him in his profession. But, independently of this difficulty, a charge of incontinence is not actionable without special damage. This was held after verdict in *Parrat v. Carpenter*,<sup>1</sup> although there the plaintiff was alleged to be parson of D., and there is as much ground for saying that a clergyman would be deprived of his cure for incontinence, as that a physician would lose his practice. The cases upon this subject are collected in *Selwyn's Nisi Prius*, Slander, II,<sup>2</sup> in *Comyns's Digest* (as cited on the other side), and in *Viner's Abridgment*, Actions (for words), D, a, and S, a, to U, a. On reference to those authorities there will be found a universal rule, that, where words have been held to be slanderous as spoken of a physician, they have imputed want of sufficient professional acquirements or skill.<sup>3</sup> In *Lumby v. Allday*,<sup>4</sup> the declaration stated that the plaintiff was clerk to a gas light company, and that the defendant, intending to cause it to be believed that the plaintiff was of a bad character, unfit for his situation, and an improper person to be employed by the company, and to cause him to be deprived of his situation, used words which charged him with incontinence; and the judgment was arrested after verdict. In giving judgment, Bayley, J., said, "Every authority which I have been able to find, either shows the want of some general requisite, as honesty, capacity, fidelity, &c., or connects the imputation with the plaintiff's office, trade, or business. As at present advised, therefore, I am of opinion that the charge proved in this case is not actionable, because the imputation it contains does not imply the want of any of those qualities which a clerk ought to possess, and because the imputation has no reference to his conduct as clerk." Words, which may injure a

<sup>1</sup> Cro. Eliz. 502; s. c. Noy, 64; and see *Gascoigne v. Ambler*, 2 Ld. Raym. 1004.

<sup>2</sup> Page 1260 to page 1267 (8th ed. 1831).

<sup>3</sup> As "thou art a quack salver." Vin. Abr. Actions (for words), S, a, pl. 10, *Allen v. Eaton*. "Thou art a drunken fool and an ass; thou never wast a scholar, thou art not worthy to speak to a scholar; this I will prove and justify." Ibid. pl. 11, *Cawdry v. Chickley*; s. c. Cro. Car. 270; and Godb. 441, pl. 509. "He is an emperic and mountebank, and a base fellow." Viner, *ut sup.* pl. 12, *Goddart v. Hasel-foot*.

<sup>4</sup> 1 Cr. & J. 301; s. c. 1 Tyrwh. 217.











man in his profession, but which do not necessarily do so, are not actionable without special damage: they must be spoken with reference to the actual trade. A maid-servant would undoubtedly be less likely to obtain a place if charged with prostitution, yet such a charge would not of itself be actionable. A school-mistress probably would suffer in her calling by being charged with incontinence, yet such a charge is not actionable without special damage.<sup>1</sup> And the words, if not actionable for want of special damage, cannot be aided by an averment that they were spoken of the plaintiff in his profession, or even that they charged him with having committed the act imputed in his particular professional character. Abstaining from acts of incontinence cannot be put as part of the profession of a physician; and, consequently, the committing or not committing them has nothing to do with the exercise of the profession. The abstinence is a duty not peculiar to a physician. Morally speaking, it is the duty of all men; but the question is, whether a charge of its non-observance affords a legal ground of complaint. A merchant might be under the necessity of frequenting a house in the exercise of his trade; but it would not be sufficient, without special damage, to aver that, in doing so, he had obtained access to a female living in the house, and had been criminally connected with her; yet this is precisely analogous to the extreme case suggested on the other side as provable consistently with the present record. In *Hartley v. Herring*,<sup>2</sup> where incontinence was imputed to a licensed preacher at a dissenters' chapel, the whole argument on both sides assumed the necessity of special damage. A similar remark applies to *Moore v. Meagher*<sup>3</sup> and *Hunt v. Jones*.<sup>4</sup> Unless this limitation be adhered to, that the words must refer to the actual exercise of the calling, it is impossible to say what imputation may not be held to be injurious to a man in his profession.

*Cur. adv. vult.*

LORD DENMAN, C. J., in this term (Nov. 24th), delivered the judgment of the court.

There are obvious and very good reasons for the jealousy with which the courts have always regarded actions of slander, particularly those in which no indictable offence has been imputed; but here the plaintiff states the grievance as affecting him in his business, office, or profession, without charging that any actual damage has accrued to him from the words spoken.

Some of the cases have proceeded to a length which can hardly fail

<sup>1</sup> Per Twisden, J., in *Wharton v. Brook*, 1 Vent. 21; and see *Wetherhead v. Armitage*, 2 Lev. 233; s. c. *Freem. 277*, as *Witherly v. Hermitage*; and 2 Show. 18, as *Wetherhead v. Brookborne*.

<sup>2</sup> 8 T. R. 130.

<sup>3</sup> 1 Taunt. 39.

<sup>4</sup> Cro. Jac. 499.

to excite surprise: a clergyman having failed to obtain redress for the imputation of adultery;<sup>1</sup> and a school-mistress having been declared incompetent to maintain an action for a charge of prostitution.<sup>2</sup> Such words were undeniably calculated to injure the success of the plaintiffs in their several professions, but, not being applicable to their conduct therein, no action lay.

The doctrine to be deduced from the older cases was recently laid down, after a full discussion, by Mr. Baron Bayley:<sup>3</sup> "Every authority which I have been able to find, either shows the want of some general requisite, as honesty, capacity, fidelity, &c., or connects the imputation with the plaintiff's office, trade, or business."

In that case, accordingly, where a verdict had been recovered by the clerk of a gas company, on a declaration alleging that the defendant, wishing to cause it to be believed that the plaintiff was unfit to hold his situation, and to cause him to be deprived of it, had said to him, "You are unfit to hold your situation," and then imputed incontinence as the reason of his unfitness, the Court of Exchequer thought the judgment ought to be arrested.

In the present case, much doubt was entertained whether the words were not actionable within the rule just adverted to. For, being laid as spoken of the plaintiff as a physician, in which character he may have opportunities of abusing the confidence reposed in him, to commit acts of criminal conversation, the statement must be thought large enough to admit such proof to be adduced on the trial, in which case the necessary proof would be presumed to have been given, and the judgment ought not to be arrested. But, after full examination of the authorities, we think that, in actions of this nature, the declaration ought not merely to state that such scandalous conduct was imputed to the plaintiff in his profession, but also to set forth in what manner it was connected by the speaker with that profession. For this defect the judgment must be arrested.

*Rule absolute.*

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## JONES v. LITTLER.

IN THE EXCHEQUER, JANUARY 16, 1841.

[*Reported in 7 Meeson & Welsby, 423.*]

**SLANDER.** The declaration stated that the plaintiff was a brewer, and that the defendant falsely and maliciously spoke and published of

<sup>1</sup> *Parrat v. Carpenter*, Noy, 64; s. c. Cro. Eliz. 502.

<sup>2</sup> Per Twisden, J., in *Wharton v. Brook*, 1 Ventr. 21.

<sup>3</sup> In *Lumby v. Allday*, 1 Cro. & J. 305; s. c. 1 Tyrwh. 224.











and concerning him in the way of his trade as a brewer the false, scandalous, malicious, and defamatory words following: "I'll" (meaning that he, the defendant, would) "bet £5 to £1, that Mr. Jones" (meaning the plaintiff) "was in a sponging-house for debt within the last fortnight, and I can produce the man who locked him up; the man told me so himself." Whereupon the said Henry Pye then asked the defendant, "Do you mean to say that Mr. Jones, brewer, of Rose Hill" (meaning and describing the plaintiff), "has been in a sponging-house within this last fortnight for debt?" and thereupon the defendant then replied to the said Henry Pye, and the said other persons then present, "Yes, I do."

The cause was tried before Rolfe, B., at the last Liverpool assizes, when, no special damage having been proved, it was objected, on the authority of *Ayre v. Craven*, that the words could not be considered as spoken of the plaintiff in the way of his trade, and therefore that he ought to be nonsuited. The learned judge refused to nonsuit, and the jury returned a verdict for the plaintiff.

*Kelly*, in Michaelmas term last, applied for a rule to show cause why a nonsuit should not be entered, or why the judgment should not be arrested. The court refused a rule on either of those grounds, but granted a rule to show cause why there should not be a new trial, on a suggestion that the learned judge ought to have left it as a question to the jury whether the words were spoken of the plaintiff in the way of his trade, and did not.

*Cresswell* and *Wightman* now showed cause. The jury have found that the words were spoken of the plaintiff in the way of his trade, and in so doing they have come to a right conclusion. The words alleged to have been spoken amount to an allegation that the plaintiff was insolvent; and if so, it must apply to him in the way of his trade as a brewer. The case of *Ayre v. Craven* was a different case altogether. If the words there laid had been alleged to have been, that in the plaintiff's character of physician he had been incontinent, they would have been actionable in themselves, as necessarily affecting him in his professional character. That case was decided on the authority of *Lumby v. Allday*, where it was held that the words charged as slanderous must show the want of some general requisite, as honesty, capacity, fidelity, &c., or connect the imputation with the plaintiff's office, trade, or business. [PARKE, B. The case of *Stanton v. Smith* is directly in point. It was there held that it was actionable to say of a tradesman, "He is a sorry, pitiful fellow, and a rogue; he compounded his debts at five shillings in the pound," though there was no *colloquium* of his trade; but if the question was put to the jury, and they found it to have been spoken of the plaintiff in his trade, there is an

end of the matter.] Insolvency is necessarily connected with trade. If a man cannot pay his debts, he cannot pay his mercantile debts. The damage is the same, whether the defendant happens to be speaking of him in his trade of a brewer or not. [ALDERSON, B. *Doyley v. Roberts*<sup>1</sup> seems to be an authority to the contrary. There the following words were spoken of an attorney, "He has defrauded his creditors, and has been horsewhipped off the course at Doncaster;" and it was held that they were not actionable, unless they were spoken of him in his profession.] The words, to be actionable, must either necessarily affect the plaintiff in his trade, must be spoken of him in his trade, or must be shown to have affected him injuriously. In *Doyley v. Roberts*<sup>1</sup> and *Ayre v. Craven*, the words did not necessarily affect the party in his trade. In Com. Dig., Action upon the Case for Defamation, D, 22, the following is put as an instance of words which are actionable: "If he say of a counsellor, 'Thou art no lawyer; canst not make a lease; they are fools that come to thee for law.'"

*Alexander*, in support of the rule. There was no evidence to show that the words were spoken of the plaintiff in the way of his trade, and that question was not properly left to the jury. [ROLFE, B. I am sure I put the question to the jury, whether the words were spoken of the plaintiff in his trade, and they found that they were.] The rule was granted on that ground.

PARKE, B. It is quite clear that this rule ought to be discharged, for the only ground on which it was granted has failed, inasmuch as the learned judge did leave the question to the jury, whether the words were spoken of the plaintiff in his trade; and, indeed, it is plain that the words were so used, from the fact that in the conversation in question the plaintiff was spoken of as a brewer. Independently of that, however, and even if they were spoken of him in his private character, I think the case of *Stanton v. Smith* is an authority to show that the words would have been actionable, because they must necessarily affect him in his trade. It is there said, "We were all of opinion that such words spoken of a tradesman must greatly lessen the credit of a tradesman, and be very prejudicial to him, and therefore that they were actionable." That case is distinguishable from *Ayre v. Craven* and *Doyley v. Roberts*.<sup>1</sup> In the latter of those cases the words were not spoken of the plaintiff in his business of an attorney; and in the former it did not appear in what manner the immorality was connected with the plaintiff's profession of a physician; and it was possible that such imputations of incorrect conduct, out of the line of their respective professions, might not injure their professional characters. But this

<sup>1</sup> 3 Bing. N. C. 835; 5 Scott, 40.









case is distinguishable, because here the imputation is that of insolvency, which must be injurious; for if a tradesman be incapable of paying all his debts, whether in or out of trade, his credit as a tradesman, which depends on his general solvency, must be injured. The case of *Stanton v. Smith*, as it appears to me, is good law, notwithstanding the observations of Coltman, J., in *Doyley v. Roberts*.

ALDERSON and ROLFE, BB., concurred.

*Rule discharged.*<sup>1</sup>

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BELLAMY v. BURCH.

IN THE EXCHEQUER, FEBRUARY 10, 1847.

[*Reported in 16 Meeson & Welsby, 590.*]

CASE. The declaration stated that the plaintiff, heretofore and before the commencement of the suit, and before and at the time of the committing of the grievances by the defendant as thereafter mentioned, was the lessee and renter of certain turnpike tolls, and, amongst others, of certain tolls arising and payable upon and in respect of a certain road, to wit, at Tewkesbury, in, &c.; and he, the plaintiff, had always well and truly and punctually paid the rent of such tolls, and had never been a defaulter in payment of any such tolls, at Tewkesbury or elsewhere; and whereas, also, at the time of the committing of the grievances by the defendant, &c., to wit, on, &c., a public meeting was held by the trustees of certain turnpike roads, to wit, in the city of Worcester, for the purpose of letting by public auction, among others, the tolls arising and payable in and upon certain turnpike roads, called, to wit, the Powick and Malvern districts, at which said meeting the plaintiff then attended for the purpose of bidding at the said auction, in order that he, the plaintiff, might become the lessee and renter from the said trustees of the said last-mentioned tolls; yet the defendant, well knowing, &c., but contriving, &c., to injure the plaintiff in his credit and reputation, and to cause it to be suspected and believed by all his neighbors, &c., that the plaintiff had been and was a defaulter as such lessee and renter of tolls as aforesaid, and to prevent the plaintiff from being received by such trustees as the renter or lessee of any of the said tolls so put up to auction as aforesaid, and thereby and otherwise to injure the plaintiff in his

<sup>1</sup> *Brown v. Smith*, 13 C. B. 596; *Davis v. Ruff*, Cheeves, 17, acc.; *Barnes v. Trundy*, 31 Me. 321; *Redway v. Gray*, 31 Vt. 292, *contra*. See *Bell v. Thatcher*, Freem. 276; *Bryant v. Loxton*, 11 Moo. 344; *Taylor v. Church*, 1 E. D. Smith, 287; *Fowles v. Bowen*, 30 N. Y. 20. — ED.



said business of renter and lessee of tolls, &c., heretofore, and before the commencement of this suit, to wit, on, &c., at the said meeting so holden as aforesaid, he the defendant, in a certain discourse which he the defendant then had of and concerning the plaintiff, and of and concerning him as such lessee and renter of tolls as aforesaid, falsely and maliciously spoke and published at such meeting, in the presence and hearing of divers and many persons, of and concerning the plaintiff, and of and concerning him as such lessee and renter of tolls as aforesaid, the false, scandalous, &c., words following, that is to say, "He" (meaning the plaintiff) "was wanted at Tewkesbury; he" (meaning the plaintiff) "was a defaulter there;" whereby and by means of the committing of which said several grievances the plaintiff was not only greatly injured in his credit and reputation, but also thereby, and on no other account whatsoever, the said trustees wholly refused to receive any biddings from the plaintiff at the said auction, for any of the said tolls so put up to auction as aforesaid, or to suffer or permit the plaintiff to bid at the said auction for the same, or to become or be the renter or lessee of any such tolls, as they otherwise might and would have done; and he the plaintiff was thereby hindered and prevented from becoming and being the renter and lessee of the said tolls arising and payable on the said roads so called, to wit, the Powick and Malvern districts, as he otherwise might and would have been; whereby he the plaintiff hath lost and been deprived of great gains and profits, amounting in the whole to a large sum of money, to wit, £200, which might and would have arisen and accrued to him therefrom; and the plaintiff, by means of the premises, hath been and is, as such renter and lessee of tolls as aforesaid, and otherwise, greatly injured and damnified, to the plaintiff's damage of £200.

Pleas, 1st, not guilty; 2d, that the plaintiff was not the lessee or renter of the said turnpike tolls in the said declaration first mentioned, or any or either of them, or any part thereof respectively, in manner and form, &c.; 3d, as to so much of the causes of action mentioned in the declaration as relate to or are connected with the plaintiff's attending the alleged public meeting alleged to have been held by the trustees of certain turnpike roads, to wit, in the city of Worcester, for the alleged purpose of letting by public auction, amongst others, the tolls arising and payable in and upon certain turnpike roads called the Powick and Malvern districts, for the purpose of bidding at the alleged auction, in order that he might become and be the lessee and renter from the said trustees of the said last-mentioned tolls, as above in that behalf mentioned, the defendant saith, that the plaintiff never attended that meeting for that or any other purpose, in manner and form, &c.; 4th, as to so much of the causes of action as relate to or are connected









with the public meeting therein mentioned, the defendant said that such public meeting never was held, in manner and form, &c.; 5th, as to so much of the causes of action in the declaration mentioned as relate to or are connected with the auction therein mentioned, defendant saith that there never was such auction as therein alleged, in manner and form, &c. Issues thereon.

At the trial, before Gaselee, Serjt., at the last assizes for Worcestershire, the chairman of the meeting of trustees for the Powick and Malvern district of turnpike roads proved that the plaintiff bid for the tolls there, and that the witness did not reject or prevent his bidding, but said he would take care he should, by his sureties, be a responsible person. Neither the plaintiff nor the defendant was the highest bidder, or became the renter of the tolls. The words were proved as laid. The learned serjeant told the jury they must be satisfied that the words were spoken of the plaintiff as a renter of tolls arising on roads at Tewkesbury. Verdict for the plaintiff, damages, 40s., leave being given to move to enter a verdict for the defendant on the first and second issues.

A rule having been obtained accordingly,

*Gray (Allen, Serjt., with him)* showed cause. The only question in this case is, whether the introductory averment in the declaration was material. The plaintiff contends that it was not. The declaration certainly begins by stating that, at the time of committing the grievances, the plaintiff was lessee and renter of certain turnpike tolls, &c.; but the words spoken by the defendant imputed to the plaintiff that, when on a former occasion he was a renter of tolls on the Tewkesbury road, he was a defaulter, viz., had not paid his Tewkesbury rent. As the plaintiff here had previously procured his living by renting of tolls, the words must be taken as used with respect to that renting, as they would in case of a profession or trade; and though at the time when the slander was uttered he was not a lessee of tolls, still, as he was about to become a renter of others, and was accustomed to do so, and procured a livelihood thereby, the cases respecting slander of a man in his profession or trade apply. *Vin. Abr. tit. Actions for Words, U, a, pl. 16, p. 474; Tuthill v. Milton.*<sup>1</sup> [PARKE, B. How does it appear that the plaintiff was going to become a renter of other tolls? *Tuthill v. Milton* goes on the presumption of the plaintiff's continuance in trade as a linen-drapeer. A profession is a continuing thing, but contracting to become a lessee of tolls is not a profession, and the habit of taking tolls is nothing. Nor is a taking of tolls as lessee an office.]

<sup>1</sup> *Yelv. 158.*

*Whitmore*, in support of the rule. These words were not actionable *per se*, without proof of special damage. The cases for slander of a man in his calling show that that calling, whatever it might be, had continued, either actually or by intendment, to the time of the speaking of the words. *Moore v. Synne*; <sup>1</sup> *Collis v. Malin*.<sup>2</sup> The latter case is as follows: "Action for words. Whereas the plaintiff had used, *per magnum tempus*, the trade of buying and selling cattle, and divers times bought upon his credit, that defendant said of him, 'Thou art a bankrupt.' Defendant pleaded not guilty, and found against him; and because he did not say that he used the trade at the time of the speaking the words, but *per magnum tempus uses fuit*, which may be divers years before, and the action lies not unless at the time of speaking, therefore it was adjudged for the defendant." Here any person might bid at the auction, and if he bid highest, and found good security, would have become the lessee of the tolls.

PARKE, B. I am of opinion that this case does not fall within that class of decisions referred to on behalf of the plaintiff, which relate to trades or professions within the legal acceptance of those terms, viz., as conditions which by law are presumed to continue and not to be altered. A farmer's occupation may be a business, in respect of his skill in cultivating land. In the case cited from Yelverton, it did not appear that the plaintiff had ceased to be of the trade of a linen-draper, and the court said they would intend that he continued to be so. Here the plaintiff was bound to prove that he exercised the so-called profession both before and at the time the words were spoken. But the jury have found that the plaintiff's profession, so called, did not continue at the time the words were spoken; that excludes all presumption on the subject; the defendant's act was nothing more than speaking of the plaintiff as a former contractor. If these words had been spoken of the plaintiff at the time when his contract for hiring the tolls existed, it is doubtful whether the action could have been maintained; I incline to think that it could not. The verdict must be entered on the second issue for the defendant; and as the plea of not guilty denies that the words were spoken in the sense laid in the declaration, of and concerning the plaintiff as lessee, and it is found that they were not spoken of him as an existing or continuing lessee, of tolls, the defendant is entitled to a verdict on that issue also.

ALDERSON, B. The effect of slanderous words spoken of a man in a trade is to render him less able to carry on that trade; but words

<sup>1</sup> 2 Roll. Rep. 84.

<sup>2</sup> Cro. Car. 282.











spoken of a man's conduct as to a past contract do not affect or injure his future conduct of another.

ROLFE, B., and PLATT, B., concurred.

*Rule absolute.*<sup>1</sup>

## PEMBERTON v. COLLS.

IN THE QUEEN'S BENCH, APRIL 15, 1847.

[*Reported in 25 Law Journal Reports, 403.*]

CASE for slander. The declaration stated that, before and at the time of the committing of the grievances thereafter mentioned, the plaintiff had been and was a clergyman of the united church of England and Ireland as by law established, in holy orders, and then was the vicar of Wandsworth in the diocese of Winchester, in England; that the plaintiff had always conducted himself in his said function and character of a clergyman with piety, honesty, and morality; that the defendant then was also a clergyman of the said united church of England and Ireland; yet the defendant, well knowing the premises, but contriving and maliciously intending to injure the plaintiff, and also the character of the plaintiff, and to degrade him in his said character of a clergyman, theretofore and after the passing of a certain statute made and passed in the fourth year of the reign of our Sovereign Lady the Queen, intituled "An act for the better enforcing church discipline," to wit, on, &c., in a certain discourse then had with one G. W. C., and divers other good and worthy subjects of this realm, of and concerning the plaintiff, and of and concerning him in his said profession of a clergyman, and relating to himself the defendant, in the presence and hearing of the said G. W. C., falsely and maliciously spoke and published of and concerning the said plaintiff the several false, scandalous, malicious, and defamatory words following, of and concerning the plaintiff, and of and concerning him in his said profession of a clergyman of the said united church, and relating to himself the said defendant, that is to say, "The very day I" (meaning the defendant) "came into residence, Dr. Pemberton" (meaning the plaintiff) "sent for me" (meaning the defendant); "I" (meaning the defendant) "went and

<sup>1</sup> *Collis v. Malin*, W. Jones, 304; *Watson v. Vanderlash*, Hetl. 71; *Moore v. Syne*, 2 Roll. R. 84; *Gibbs v. Price*, Sty. 231; *Windsor v. Oliver*, 41 Ga. 538; *Dicken v. Shepherd*, 22 Md. 399; *Allen v. Hillman*, 12 Pick. 101; *Harris v. Burley*, 8 N. H. 216; *Forward v. Adams*, 7 Wend. 204; *Edwards v. Howell*, 10 Ired. 211; *Wilson v. Runyon*, Wright (Ohio), 651, acc. See *Mordant v. Bridges*, Moo. 686; *Jordan v. Lyster*, Cro. El. 273; *Hammond v. Kingsmill*, Sty. 210; *Smayles v. Smith*, 1 Brownl. 1, 16; *Jones v. Stevens*, 11 Price, 235. — ED.

dined with him" (meaning the plaintiff), "and the wine must have been drugged, for I" (meaning the defendant) "took but two glasses, and was quite stupefied; while in this condition, Dr. Pemberton" (meaning the plaintiff) "put a bill into my hands, and requested me" (meaning the defendant) "to sign it, saying. Colls" (thereby meaning the defendant), "just put your name to this; I wish to have it as a security for the payment of £130 per annum for reading for you at the new church. I" (meaning the defendant) "answered, Well, give me a pen, and I will sign it; but I thought I had sufficiently satisfied you" (meaning the plaintiff). "Immediately I" (meaning the defendant) "had signed it, Dr. Pemberton" (meaning the plaintiff) "snatched it up, and walked to the fire in order to dry the signature, and, laughing, said, This will be quite safe; I" (meaning the plaintiff) "will take care of this. The bill, I" (meaning the defendant) "think, was drawn for £2500, but, having been stupefied with the wine, I" (meaning the defendant) "do not rightly remember." And in another part of the same discourse which the defendant then had with the said G. W. C. of and concerning the plaintiff, the defendant, in the presence and hearing of the said G. W. C., falsely and maliciously spoke and published of and concerning the plaintiff the other false, scandalous, malicious, and defamatory words following, of and concerning the plaintiff, and of and concerning him in his said profession of a clergyman, as aforesaid, and of and relating to himself the defendant, that is to say, "You cannot suppose that I" (meaning the defendant) "can visit a man" (meaning the plaintiff) "who so cheated me" (meaning the defendant) "at my first coming" (thereby meaning that the plaintiff had fraudulently obtained the said bill hereinbefore mentioned from the defendant, whilst he, the defendant, was stupefied with drugged wine).

Second count. That afterwards, and after the passing of the said statute hereinbefore mentioned, to wit, on the day and year aforesaid, the defendant, further contriving and maliciously intending to injure the plaintiff, and to degrade him in his said character of a clergyman, in a certain other discourse which the defendant then had with a certain other person, to wit, one C. H., and divers other good and worthy subjects of this realm, of and concerning the plaintiff, and of and concerning him in his said profession of a clergyman of the said united church, and relating to himself, the defendant, in the presence and hearing of the said C. H., and in the presence and hearing of the said other good and worthy subjects of this realm, falsely and maliciously spoke and published of and concerning the plaintiff, and of and concerning him in his said profession, the several false, scandalous, malicious, and defamatory words following, of and concerning the plaintiff, and of and concerning him in his said profession of a clergy-











man, as aforesaid, and relating to himself the defendant, that is to say "Dr. Pemberton" (meaning the plaintiff) "placed before me" (meaning the defendant) "a bill; "I" (meaning the defendant) "signed; I" (meaning the defendant) "do not know for what amount it was, whether for £2000 or £3000, for I" (meaning the defendant) "was completely pigeoned by Dr. Pemberton" (meaning the plaintiff), thereby meaning that the plaintiff had obtained the said bill from defendant by fraud.

There was a third count, which is not material, and an allegation of special damage.

Pleas: first, not guilty; second, a denial that the special damage in the declaration mentioned occurred by reason of the premises therein mentioned. Issues thereon.

At the trial no proof was given of the special damage laid in the declaration, and the plaintiff had a verdict for £200 on the issue raised on the first and second counts. In Easter term, 1846, a rule *nisi* was obtained, calling upon the plaintiff to show cause why the judgment should not be arrested, or why a *venire de novo* should not be awarded, or a new trial had, against which

*Montagu Chambers* and *Peacock* showed cause.<sup>1</sup> The judgment cannot be arrested unless both the first and second counts are bad; and a *venire de novo* can only be awarded if one or other of these counts are bad. But both the counts are good without any allegation of special damage. The first charges a giving of drugged wine to the plaintiff, for the purpose of defrauding him; this amounts to a cheat, and is indictable at common law. Hawk. Pleas of the Crown, b. 1, ch. 71, § 1. Secondly, the words impute an offence for which the plaintiff would be liable to suspension or deprivation as a clergyman; and so they are defamatory. *Parergon Juris Canonici Anglicani*, p. 208, 238. But another view may be taken; the plaintiff falls within the class of persons filling a particular office, and words spoken of him with reference to that office are actionable, though they would not be so otherwise. The plaintiff is averred to be a clergyman and vicar of Wandsworth, and the words are alleged to have been spoken of him in that character. Thus it is actionable, *per se*, to say of a physician that "he is no scholar." *Cawdry v. Highley*. But it is not necessary that the words should be spoken of the plaintiff in any particular character, if he in fact fills that character, and may be injured in it by them. 1 Starkie on Libel, p. 153. "Where an office, profession, or employment of the plaintiff requires great talent and high mental attainments, general words imputing want of ability are actionable,

<sup>1</sup> Before Lord Denman, C. J., Patteson, Wightman, and Erle, JJ.

without express reference to his particular character;" on this ground it is actionable to say of a clergyman that he is immoral, as morality and integrity are necessary for him, just as it is actionable to say of a trader that he is insolvent.

[PATTESON, J. Imputing insolvency to a trader necessarily applies to his trade, and so is actionable; but it is not so to say he has committed a fraud; and yet honesty is as necessary to a trader as to a clergyman.]

Blunden v. Eustace<sup>1</sup> shows that it is slanderous to say of a surveyor that "he is a cozening, shifting, cheating knave;" for such words touch him in his profession. In Lord Townsend v. Dr. Hughes<sup>2</sup> it is said that it is actionable to say of a bishop, "he is a wicked man;" or of a justice of the peace and deputy-lieutenant, "He is a Jacobite, and will bring in popery." How v. Priun.<sup>3</sup>

[PATTESON, J. Your argument is that the words "of and concerning him as such clergyman" may be struck out, and that it is enough if the words were spoken of him when he was a clergyman.]

There is a case in Roll. Abr. 55, cited in Com. Dig., Action upon the Case for Defamation, D, 25, where it was held actionable to say of an attorney, "he has the falling sickness;" for that disables him in his profession.

*Shee*, Serjt., and *Bovill*, in support of the rule. The first point made on the other side is, that the words set out in the first count impute an indictable offence at common law; and Hawkins's Pleas of the Crown is cited as an authority; but that *dictum* has been again and again overruled. 2 East's Pleas of the Crown, p. 818; 3 Burn's Justice, tit. Cheat, p. 127. The distinction now recognized is between a cheat which may affect the public, and one which merely affects an individual. The King v. Wheatley.<sup>4</sup> In Savile v. Jardine, Eyre, C. J., says that it is not actionable to call a man a cheat merely. In 2 Russell on Crimes (3d ed.), p. 282, cheats and frauds, punishable at common law, are defined as "the fraudulent obtaining the property of another by any deceitful or illegal practice, or token short of felony, which affects or may affect the public." The King v. Haynes.<sup>5</sup> In The King v. Pywell,<sup>6</sup> it was laid down that, in order to render such a cheat as this indictable, there must be a conspiracy. Then the other ground for supporting the declaration is, that the words are alleged to have been spoken of the plaintiff in his profession of a clergyman. But there is nothing on this record which shows that these words were spoken of the plaintiff in that character, which is essential, according

<sup>1</sup> Cro. Jac. 504.

<sup>2</sup> 2 Mod. 159.

<sup>3</sup> 2 Salk. 694.

<sup>4</sup> 2 Burr. 1129.

<sup>5</sup> 4 Mau. & Selw. 214.

<sup>6</sup> 1 Stark. N. P. C. 402.









to *Ayre v. Craven*, where *Lumby v. Allday* and *Parrat v. Carpenter* were cited. There is nothing to connect the words with the office of clergyman.

[PATTESON, J. The words are alleged to have been spoken in the course of a transaction between the plaintiff and the defendant as clergyman.]

But it does not appear that the transaction had any reference to the plaintiff's character of vicar of Wandsworth; and it is not enough that it refers merely to him as a clergyman, according to *Ayre v. Craven*.

[LORD DENMAN, C. J. That was a general imputation of immorality.]

There is no averment that there was any transaction between the plaintiff and the defendant as clergymen, and therefore an *innuendo* to that effect will not extend the natural meaning of the words. *Angle v. Alexander*; <sup>1</sup> *Goldstein v. Foss*; *Day v. Robinson*; <sup>2</sup> *Gompertz v. Levy*.<sup>3</sup>

[PATTESON, J. Suppose it all fiction as to the new church, and the plaintiff's reading there, would not the statement that the plaintiff drugged the defendant's wine, in order to get him to sign a bill for £2000, for reading for him at a new church, be a matter of ecclesiastical cognizance?]

It probably would; but an imputation of an offence of ecclesiastical cognizance is not actionable *per se*. *Starkie on Libel*, 24: "It seems also to be clearly established that words imputing an offence merely spiritual are not in themselves actionable; and the reason assigned for this is, that the person slandered may, for such words, institute a suit in the spiritual court; and that if an action were to be entertained in a temporal court, the party would be twice punished for the same words." This distinction was taken in *Evans v. Gwyn*.<sup>4</sup> This is clearly not an offence within the Church Discipline Act. There is no authority cited for such an imputation being actionable, except the *dictum* of *Scroggs, C. J.*, in *Lord Townsend v. Dr. Hughes*, which is of light authority.

*Cur. adv. vult.*

May 8. LORD DENMAN, C. J. Without entering into a lengthened examination of the decisions on the questions raised, we think it enough to say that the imputation cast on the plaintiff, by the words set forth in the first count, appear to us to reflect on the plaintiff in his professional character; and that cast on him in the second count does not so

<sup>1</sup> 7 Bing. 119.

<sup>2</sup> 1 Ad. & El. 554; s. c. 3 Law J. Rep. (n. s.) Exch. 381.

<sup>3</sup> 9 Ad. & El. 282; s. c. 8 Law J. Rep. (n. s.) Q. B. 5.

<sup>4</sup> 5 Q. B. Rep. 844; s. c. 13 Law J. Rep. (n. s.) Q. B. 222.



affect him within the meaning of the cases.<sup>1</sup> The consequence is, as the damages were taken on the two jointly, that a *venire de novo* must be awarded, that the damages may be assessed on the good count only.

*Venire de novo.*

### GALLWEY v. MARSHALL.

IN THE EXCHEQUER, DECEMBER 8, 1853.

[Reported in 9 *Exchequer Reports*, 294.]

THE declaration stated, that before and at the time of the malicious speaking hereinafter mentioned, the plaintiff was in holy orders as a clergyman of the Church of England; and before the malicious speaking, and whilst he was in holy orders and was residing in Buckinghamshire, he had been accused of having been guilty of incontinency with a certain woman, and of being the father or putative father of a certain bastard child, and had been summoned to show cause why he should not contribute to the maintenance of the said child; and, on the hearing of the summons, had been adjudged not to have been guilty of incontinence with the said woman, and not to be the father of the said bastard child; yet the defendant, in a conversation about the premises with a certain person, to wit, one A. Horncastle, falsely and maliciously spoke and published of the plaintiff, in his character of a clergyman of the Church of England, the words following, that is to say, "If Mr. Appleton knows nothing against Mr. Gallwey" (meaning the plaintiff), "the bishop" (meaning the Lord Bishop of Lincoln) "does." And, in answer to a question by the said A. Horncastle, what the said bishop knew against the plaintiff, the defendant falsely and maliciously spoke and published of the plaintiff, as such clergyman, the further words following, that is to say, "Why, that great affair in Buckinghamshire" (the defendant meaning thereby that the conduct of the plaintiff, in and with respect to the said matter, had been of a gross and scandalous nature, and that the defendant had been guilty of incontinence with the said woman, and was the father of the said bastard child).

Demurrer and joinder therein.

*Turner* argued in support of the demurrer (in Michaelmas term, Nov. 16, 21). The action is not maintainable. In *Ayre v. Craven*, which decided that words imputing adultery to a physician are not actionable without special damage, Lord Denman, C. J., in delivering

<sup>1</sup> *Hopwood v. Thorn*, 8 C. B. 293; *McDowell v. Bowles*, 8 Jones (N. Car.), 184, acc. — ED.









the judgment of the court says, "After full examination of the authorities, we think that, in actions of this nature, the declaration ought not merely to state that such scandalous conduct was imputed to the plaintiff in his profession, but also to set forth in what manner it was connected by the speaker with that profession. The doctrine there laid down was recognized and adopted in *James v. Brook*.<sup>1</sup> In *Parrat v. Carpenter*, it was held not actionable to say of a beneficed clergyman that he is an adulterer. It was argued, that an action lay for those words, "for they be very slanderous to the plaintiff, and touch him in his credit and profit, and are cause of deprivation if they be true;" but the court held, that it was a slander examinable only in the spiritual court. [PARKE, B. That case is overruled by *Dod v. Robinson*.] Numerous authorities are collected in Com. Dig. tit. Action upon the Case for Defamation, F, 20, showing that words are not actionable if they "do not charge with an offence for which the party shall have a temporal damage, though they are *contra bonos mores*." In *Starkie on Slander*, p. 126 (2d ed.), it is said: "The action extends to words spoken of men in their profession as barristers, attorneys, physicians, and clergymen. But it may be doubted whether words spoken of a clergyman would be actionable, unless he held some benefice or preferment, of which he might be deprived if the words were true." *Hopwood v. Thorn* decided, that words imputing dishonesty to a dissenting minister were not actionable, the words not having been spoken of the plaintiff in reference to his office of minister, and there being no proof of special damage. [PLATT, B. The offence imputed would, if true, subject the plaintiff to punishment under the Church Discipline Act.<sup>2</sup> [That act does not authorize temporal punishment, but only regulates the former mode of proceeding, which was by spiritual censure, under the 1 Hen. VII. c. 4. In *Pemberton v. Colls*, the declaration stated that the plaintiff was a beneficed clergyman; but this declaration contains no allegation to that effect, and there is nothing to connect the imputation with his professional character. [ALDERSON, B. In *Dod v. Robinson*, the declaration alleged that, in the 13 Car. II., the plaintiff was instituted and inducted into a parsonage, and executed the office of a pastor for four years. The action was brought in the 23 Car. II., and the court doubted whether it could be maintained, because the plaintiff had alleged a special time during which he exercised the office; and therefore it should not be intended that he continued longer than himself had laid it. That is an authority in favor of requiring an averment that the plaintiff was a beneficed clergyman, and that the words were spoken of him as such.]

<sup>1</sup> 9 Q. B. 7.<sup>2</sup> 3 & 4 Vict. c. 86.

*Willes*, contra. First, it is not necessary to allege that the plaintiff was a beneficed clergyman, since the words were calculated to injure him in his office. The doctrine, that a charge of incontinence is not of itself actionable, because incontinence is only the subject of spiritual censures, does not apply to the case of a clergyman; for such a charge, if true, would subject him to deprivation of his office. Rogers's Ecclesiastical Law, tit. Deprivation;<sup>1</sup> *Burgoyne v. Free*;<sup>2</sup> *Oliver v. Hobart*.<sup>3</sup> Whether beneficed or not, it is an injury to him to be degraded from his order, and precluded from administering the sacred rights of the Church. That difference between the case of a person in holy orders and a layman was recognized by the statute 1 Hen. VII. c. 4, and subsequently by the 31 Hen. VIII. c. 14, § 10, by which a priest keeping a concubine forfeited his goods, chattels, and promotions, and was to suffer imprisonment at the king's will. Burns's Ecclesiastical Law, tit. Deprivation.<sup>4</sup> Again, the proceedings under the Church Discipline Act, 3 & 4 Vict. c. 86, are not of a mere spiritual nature *pro salute animæ*, but essentially *in poenam*. In 1 Roll. Abr. tit. *Action sur Case*, T, it is said, that an action lies for saying of a churchwarden, in reference to his office, that he had cheated the parish; for he is a spiritual officer as well as a temporal; also that it is actionable to say of a beneficed clergyman, "he preacheth lies in the pulpit;" for that is cause of deprivation, by which he might have temporal damage. The distinction between slander of this kind, spoken of a person in holy orders and of a layman, is adverted to in *Ireland v. Smith*.<sup>5</sup> *Parrat v. Carpenter* is no authority for the proposition which it professes to decide, and is overruled by *Dod v. Robinson*. Secondly, as the words necessarily affect the plaintiff in his office of clergyman, it need not be alleged that they were spoken of him in his office. The case of *Ayre v. Craven* is an extreme case. [ALDERSON, B. There are certain professions, the proper exercise of which depends on morality; and except for the case of *Ayre v. Craven*, I should have thought that that of a physician was one of them.] There are, no doubt, certain branches of the medical profession in which a charge of incontinence would be destructive to the professors; but it does not necessarily follow that such an imputation would injure a physician in the particular branch in which he practised. It is different, however, with a clergyman, for, without morality he cannot conscientiously exercise his sacred functions. [POLLOCK, C. B. A disposition to falsehood would be equally improper in a clergyman, and yet no action would lie for saying of a clergyman that he was a common liar. If we were to relax the rule, actions of this kind would be innumerable.]

<sup>1</sup> Page 340 (2d ed.).<sup>2</sup> 2 Hagg. 456, 662.<sup>3</sup> 1 Hagg. 43.<sup>4</sup> Page 141 d (9th ed.).<sup>5</sup> 2 Brown, 166.











It is actionable *per se* to say of a merchant that he is insolvent, for the imputation directly affects him in his business. *Jones v. Littler*. The same principle applies to charges made against a clergyman, which would subject him to deprivation. In *Pemberton v. Colls*, the defamatory words stated in the second count did not impute an offence which necessarily affected the plaintiff in his office, and led to deprivation. The case of a dissenting minister is also different, because he does not hold an office of which the law takes cognizance. But, at all events, there is a sufficient statement in the declaration to connect the imputation with the plaintiff's office; for, in the conversation, the bishop of the diocese is referred to as having knowledge of the offence. Thirdly, since the 15 & 16 Vict. c. 76, § 61,<sup>1</sup> it is a question for the jury at the trial to say in what sense the words were used.

*Turner*, in reply. The authorities cited show that the action will not lie unless it is alleged that the plaintiff was a beneficed clergyman; and, moreover, it must appear that the words were spoken of him as such. It was never intended by the 15 & 16 Vict. c. 76, to dispense with allegations which were material in order to show a cause of action, but only that where words would bear a double meaning it should be sufficient to allege that they were used in a defamatory sense.

*Cur. adv. vult.*

The judgment of the court was now delivered by

POLLOCK, C. B. (after stating the pleadings, his Lordship proceeded). We should have had no doubt in the present case of the plaintiff's right to recover, if the declaration had averred that the plaintiff was beneficed, or was in the actual receipt of professional temporal emolument, as a preacher, lecturer, or the like, at the time of the speaking of the words, as the charge, if true, would have been a cause of deprivation of the benefice in the first case, and also of degradation from orders, and consequently of the loss of the emoluments in the other cases. This point was decided in *Dr. Sibthorpe's Case*,<sup>2</sup> *Dod v. Robinson*, in effect overruling the case relied upon for the defendant, *Parrat v. Carpenter*; in which case the court held that the slander was examinable in the spiritual court only; and the reason assigned in *Dod v. Robinson* is, that the matter charged is good cause to have him degraded, whereby he should lose his freehold, which is a

<sup>1</sup> "In actions of libel and slander, the plaintiff shall be at liberty to aver that the words or matter complained of were used in a defamatory sense, specifying such defamatory sense without any prefatory averment to show how such words or matter were used in that sense, and such averment shall be put in issue by the denial of the alleged libel or slander; and where the words or matter set forth, with or without the alleged meaning, show a cause of action, the declaration shall be sufficient."

<sup>2</sup> Sir W. Jones, 366.

temporal damage to him. And the reason given in 1 Roll. Abr. is that he could have temporal damage by the speaking of slander. To the same effect is the *dictum* of Lord Holt, as to an imputation of a want of learning being actionable, in *Coxeter v. Parsons*.<sup>1</sup> In the case of *Dod v. Robinson*, the words imputed to the plaintiff not only incontinence, but preaching false doctrine, both of which were causes of degradation, and consequently of deprivation; and the latter charge implied misconduct in his office. But we think it clear that the charge of incontinence made against a beneficed clergyman, and alleged to have been committed whilst he is beneficed, is of that nature that necessarily tends to do him injury in his professional character, and to endanger him in the enjoyment of his office of parson, and is therefore actionable. In this respect, the charge differs from that which was the subject of the second count in the case of *Pemberton v. Colls*.

But in the absence of any averment of the plaintiff having any office or employment of temporal profit, we are not satisfied that this action will lie. There is no authority to be found that we are aware of, in support of the position that it will, where there is no actual damage; and we ought not to extend the limits of actions of this nature beyond those laid down by our predecessors. The words are actionable in the spiritual court, as they import incontinency, and incontinency may be punished there, and there only; and if the plaintiff be in orders merely, and not being injured in respect of temporal profit, the only remedy appears to be in the ecclesiastical court.

If incontinence was a crime punishable by temporal punishments, the words spoken might fall within the ordinary rule, that words are actionable which charge an offence liable to temporal punishment. But the statute 1 Hen. VII. c. 4, gives jurisdiction to punish incontinence in ecclesiastics to the archbishop, bishops, and ordinaries only. The Clergy Discipline Act, 3 & 4 Vict. c. 86, does not make such an offence punishable by temporal punishment. Both of these statutes are for giving additional power to ecclesiastical tribunals only.

We therefore think that we ought to hold that the action will not lie.

PLATT, B., added. I must own that during the argument I entertained considerable doubt on the subject. Incontinency is a sufficient ground for deprivation *a beneficio* or *ab officio*, the latter being applicable to the case of an incontinent clerk in orders merely, and without a benefice. It therefore seemed to me, that if the offence imputed was, if true, a sufficient ground for depriving the clergyman of his status as such, the slander would be actionable *per se*, inasmuch as the degradation from his order would be a temporal damage. If the slander had been of a barrister, imputing to him such misconduct as

<sup>1</sup> 1 Ld. Raym. 423; 1 Salk. 692.











would justify his being disbarred, it might be a good cause of action against the slanderer, although the slandered person never held a brief, or his profits were merely honorary. Other instances may be readily suggested; but I do not feel so strong upon the point as to induce me to differ from the other members of the court.

*Judgment for the defendant.*<sup>1</sup>

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IRWIN v. BRANDWOOD.

IN THE EXCHEQUER, JANUARY 28, 1864.

[Reported in 2 Hurlstone & Coltman, 960.]

DECLARATION. That before the speaking of the words hereinafter mentioned, the plaintiff had duly obtained such certificate of competency as is required by the Merchant Shipping Act, 1854, to be obtained by persons intending to become masters of foreign-going ships, and, possessing the said certificate, commanded a ship or vessel called the "Nelson," being a foreign-going ship within the meaning of the said act, as the master of the said ship for hire and wages payable to him in that behalf, during a foreign voyage, in the course of which the said vessel sailed to and stayed at Nassau, within her Majesty's dominions in the West Indies, under the command of the plaintiff as such master as aforesaid; and at the time of the speaking of the said words the plaintiff still retained such certificate as aforesaid, and exercised the employment or profession of a certificated master mariner, and sought his livelihood thereby. Yet the defendant Jane, then being the wife of the defendant William, falsely and maliciously spoke and published of the plaintiff, as such master mariner as aforesaid, the words following, that is to say: "During his stay at Nassau he was frequently drunk, and in that state he had to be carried to his boat to reach his vessel, which was standing out several miles" (meaning that the plaintiff, whilst he was master of the said ship or vessel as aforesaid, contrary to his duty as master of the said ship or vessel, during the stay of the said ship or vessel at Nassau, had been frequently drunk, and had been guilty of a gross act of drunkenness): whereby the plaintiff's character and reputation as a master mariner as aforesaid have been injured, and the plaintiff's said certificate became liable to be suspended or cancelled if the said charge had been true. Demurrer, and joinder therein.

<sup>1</sup> In *Payne v. Beawmorris*, 1 Lev. 248, the declaration alleged that the plaintiff was chaplain to a peer, and that the defendant falsely alleged of him that he had had a bastard, whereby he lost the chaplainship; and the action was held maintainable, on the express ground that the chaplainship was a temporal preferment.

*Baylis* argued in support of the demurrer (January 25).<sup>1</sup> Words imputing drunkenness to a master mariner are not actionable without special damage. In *Ayre v. Craven*, Lord Denman, in delivering the judgment of the court, said: "There are obvious and very good reasons for the jealousy with which the courts have always regarded actions of slander, particularly those in which no indictable offence has been imputed." [MARTIN, B. Suppose it was said of a coachman that he was habitually drunk. PIGOTT, B. Or that he was drunk when about to mount the box.] Words spoken of a person in his office are not actionable, unless they are spoken of him with reference to his character and conduct in such office, and impute to him the want of some qualification for or misconduct in his office. *Lumby v. Allday*. The Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), § 239, only speaks of the drunkenness of a master whilst engaged in the performance of his duties. [PIGOTT, B. Must we not assume that when he got on board the vessel he would be in command?] There is no imputation of drunkenness on board the ship. The words must necessarily tend to injure him in his employment. As in the case of a clergyman, no action will lie for a verbal imputation of incontinence unless he is beneficed or holds some clerical office or employment of profit. *Gallwey v. Marshall*.

*Day*, contra. The declaration contains a sufficient allegation that the words were spoken of the plaintiff whilst in the discharge of his duty as master; for it states that the vessel sailed to and stayed at Nassau under the command of the plaintiff as such master. In one sense the captain of a ship is as much in command whilst on shore as on board of her. It would be actionable to impute to the driver of a stage-coach that he left it outside a public-house whilst he was drunk within; for although not upon the box he would be in charge of the coach. A master mariner is within the rule laid down in *Starkie on Libel*, p. 126 (2d ed.), as to words spoken of men in their profession or employment by which they gain their livelihood. In *Gallwey v. Marshall* the plaintiff had no office or employment of temporal profit which could be affected by the slander; and in that respect the case differs from *Pemberton v. Colls*. Here the slander tends to prejudice the plaintiff in his employment, for by the 242d section of the Merchant Shipping Act, 1854, the Board of Trade may suspend or cancel the certificate of a master if, upon investigation, he is reported to have been guilty of drunkenness. In *Starkie on Libel*, p. 130 (2d ed.), it is said: "The only question arising upon this point seems to be this, — Do the words in any degree prejudice the plaintiff in his office, profession,

<sup>1</sup> Before Pollock, C. B., Martin, Channell, and Pigott, BB.









or employment? If they do, they are actionable: the *quantum* of damage being a mere question of fact for the consideration of the jury."

*Baylis*, in reply. Reading the 242d section of the Merchant Shipping Act, 1854, in connection with the 239th, drunkenness is not an offence within the act, unless it tends to the loss or damage of the ship, or endangers the life or limb of persons on board. A jury may find that words which are *prima facie* actionable were not spoken in a slanderous sense, but they cannot make words actionable which are not so in point of law. [CHANNELL, B. If words are actionable *per se*, no *innuendo* is wanted. If they are not actionable, an *innuendo* cannot make them so. But there is an intermediate case, viz., where they may or may not be actionable, and then it is for the jury to say in what sense they were spoken. POLLOCK, C. B. In *Weatherhead v. Armitage*, it was held not actionable, without special damage, to say of a woman who taught young women to dance, "She is as much a man as I am; she got J. S. with child; she is an hermaphrodite."] That case is an authority that the slander must directly affect the plaintiff in his employment. *Cur. adv. vult.*

POLLOCK, C. B., now said, This was an action for slander uttered by the defendant's wife, who imputed drunkenness to the plaintiff, a certificated master mariner, while in command of a vessel at sea in the West Indies. We are all of opinion that such words spoken of the plaintiff, while the master and in command of the vessel, are actionable without special damage. Therefore the judgment of the court will be for the plaintiff. *Judgment for the plaintiff.*<sup>1</sup>

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### FOULGER v. NEWCOMB.

IN THE EXCHEQUER, JUNE 17, 1867.

[Reported in *Law Reports*, 2 *Exchequer*, 327.]

DECLARATION. First count: that the plaintiff was a warrener, gamekeeper, horse-slaughterer, and grease manufacturer; that he carried on these businesses in the neighborhood of Ridler's Wood; and that he was accustomed to be employed in his business of gamekeeper and warrener by occupiers of land in that neighborhood; that many of the persons who so employed him were accustomed to hunt foxes, and it was considered by them a very improper act to kill or destroy foxes in the neighborhood; and a person who should be guilty of so

<sup>1</sup> See *Ingram v. Lawson*, 6 B. N. C. 212. — Ed.



killing and destroying foxes would be looked upon by them with disfavor and suspicion, and would not be employed by them; and the plaintiff was always employed as such warrener and gamekeeper upon the terms and understanding that he should not nor would kill foxes in the neighborhood; that the plaintiff had been employed as such warrener and gamekeeper upon the terms aforesaid by one of the said occupiers, and had by reason of such employment to perform his calling in Ridler's Wood, but not to kill foxes there, and it would have been a gross breach of his duties as such warrener and gamekeeper, and in his said employment, had he killed foxes in the wood, of all which premises the defendant at the time, &c., had notice; yet the defendant falsely and maliciously spoke and published of the plaintiff, and of him as such warrener and gamekeeper, and of his conduct whilst he was so employed, the words following: "It is no wonder we did not find any foxes in Ridler's Wood, because Foulger trapped three foxes. I can prove it myself;" meaning thereby that the plaintiff, whilst he was so employed as aforesaid, in breach of his duty, killed and destroyed three foxes in the said wood; whereby the plaintiff has been greatly injured in his credit, reputation, and circumstances, and in his said occupations and businesses of a gamekeeper, warrener, horse-slaughterer, and grease manufacturer; alleging special damage from the refusal of divers of the said occupiers of land and others to employ him in the way of his said occupations and businesses.

Second count, repeating the allegations of the first count, except that it omitted the allegation as to plaintiff's employment by one of the occupiers, and the subsequent allegations, and in lieu thereof alleged that the defendant falsely and maliciously spoke and published of the plaintiff, and of him as such warrener and gamekeeper, and of his conduct whilst in those occupations, the words, "Foulger trapped three foxes in Ridler's Wood," meaning that the plaintiff, whilst he was employed as such warrener and gamekeeper, wrongfully, unlawfully, and without the authority, leave, or license of the occupier or person in possession of the wood, or any other person, broke in, entered, and trespassed in the same, for the purpose of killing, and had killed, foxes there, contrary to the will of his employer and the terms of his employment, whereby the plaintiff has been and is damaged in the manner and to the extent in the first count mentioned. Demurrer to both counts, and joinder.

*Hance*, in support of the demurrers, contended that the words were not actionable *per se*, since they only imputed to the plaintiff the killing of animals regarded by the law as vermin; and that they did not become actionable because the doing so was a breach of contract; that the special damage was not a natural result of the words, and was











his business may apply, it is necessary that the words (being capable of having reference to the business) should in fact be spoken of him in respect of his business. This is alleged in the present case, and for the present purpose the allegation must be taken to be true. Next, it must appear that they tend to prejudice him in that business. This, as well as whether the words are capable of having reference to the business, must, of course, depend upon the nature of the business. Now, we think that the rule as to words spoken of a man in his office or trade is not necessarily confined to offices and trades, of the nature and duties of which the court can take judicial notice. The only limitation of which we are aware is, that it does not apply to illegal callings; as, for instance, to the keeping\* open rooms for pugilistic encounters, as in *Hunt v. Bell*; see also *Morris v. Langdale*,<sup>1</sup> a case relating to stock-jobbers, in which the decision proceeded on the ground that stock-jobbers were at that time of two classes, one honest, the other practising what the legislature by the statute then in force called "the infamous practice of stock-jobbing;" and that there was not in the declaration any averment of which business the plaintiff carried on, or whether the contracts he was unable, or said to be unable, to carry out, were legal or illegal contracts. On the same principle, that words having a particular meaning in a particular trade, or a particular locality, may be explained by averment and *innuendo* in the declaration, we think that the nature and duties of the trade or business may be explained by averment in the declaration, so as to show how the words spoken affect the business.

In the present case we could not, we think, take judicial notice that it could be the duty of a gamekeeper not to trap foxes, or that it would be a disparaging thing to say of him that he trapped foxes. It is, however, alleged, not only that the plaintiff was a gamekeeper, but that it was his duty as such gamekeeper not to kill foxes; that he was employed on the terms of his not doing so; and that the defendant knew all this.

So far, then, it is clear that, this being the true nature of the plaintiff's business and employment, to hear that he trapped foxes would prejudice him with respect to his business, at all events, with all persons who knew the real nature of his employment. It is not, however, quite clear that, where the nature of the business would not be generally understood, it might not be necessary to show that the hearers were aware of the facts necessary to give the words their defamatory sense. Here the declaration does not appear to contain a distinct allegation that the hearers knew that the plain-

<sup>1</sup> 2 B. & P. 284.











tiff's duty was not to kill foxes. It does set forth something as to what the people of the neighborhood knew and thought, but it does not state that the slander was uttered to people of the neighborhood. It does, however, contain an *innuendo* that the words imputed a breach of duty. We think that this may be taken to be equivalent to an allegation that the words would convey that meaning to the hearers, and, taking it with the rest of the declaration, we think it is sufficient to make the declaration good without special damage.

In *Ayre v. Craven*, the physician's case, which was the principal authority relied on in support of the demurrers, the decision proceeded on the ground that the declaration did not set forth in what manner the misconduct was connected with the plaintiff's profession. Here the declaration does set forth that it was the duty of the plaintiff, in his employment, not to do that which the words complained of charged him with doing. Therefore the objection which was successful there does not arise here. On the whole, therefore, we think that the present declaration shows a good cause of action, independently of special damage.

It is, however, clearly shown on the declaration that the words are capable of bearing a defamatory sense, viz., the imputing a breach of duty to the plaintiff; and it is alleged that the defendant, knowing the circumstances that made the words defamatory, falsely and maliciously used them in the defamatory sense. That being so, even if the law will not imply damage under the circumstances, still the words are actionable, and the defendant is responsible if they cause, as their legal and natural consequence, actual damage. Here actual pecuniary damage in the plaintiff's business or employment generally is alleged, and we think that this allegation at all events makes the declaration good. Of course, if the plaintiff should only prove damage in the horse-slaughtering or grease manufacturing departments of his trade, that would not help his case; but, as it is alleged in his business as a whole, we must take it that he means to prove damage in the other branch of his business, in which case it may well be the legal and natural consequence of the words.

There is a second count, alleging that the words imputed a trespass as well as a breach of duty; this does not appear to differ substantially from the other.

We therefore hold both counts good.

*Judgment for the plaintiff.*

## GARR v. SELDEN.

SUPREME COURT, NEW YORK, MAY 7, 1848.

[*Reported in 6 Barbour, 416.*]

DEMURREE to declaration. The action was for a libel. The declaration alleged that the plaintiff was an attorney and counsellor-at-law and a solicitor in chancery; that having been concerned in the prosecution of divers suits, &c., for the defendant Selden and one Richards, upon their retainer, he commenced an action in this court against them for the recovery of moneys claimed by the plaintiff to be due from them to him, for his work, labor, and services as such attorney, counsellor, and solicitor, in and about the prosecution of those suits, &c.; that the defendant and said Richards pleaded the general issue in the said action, and annexed thereto a notice of special matter, a part of which was in these words:—

“And these defendants will further prove on the trial of this cause, that the said plaintiff conducted the prosecution and defence of the several suits, and attended to the other professional services of attorney, solicitor, and counsellor in said declaration, in so careless, negligent, unskilful, undue, and improper mode and manner, as to render such professional services, and every part thereof, wholly abortive, and of no value to the said defendant.” That the plaintiff made a motion to the court to strike out that part of the notice, as false and slanderous; that in opposition to said motion the defendant Selden made an affidavit, and read and published the same in open court, on the hearing thereof, and placed the same on the files of the court, containing among other things the following irrelevant, impertinent, false, scandalous, defamatory, and libellous matter, to wit: “David Selden, one of the said defendants, deposes and says, that the said plaintiff revealed and disclosed confidential communications which deponent had made to said Garr as the attorney of the deponent and said Richards, relative to a portion of the professional business for which this suit is brought. And that said Garr revealed said communications for the purpose of aiding, assisting, and abetting an individual who had an interest adversely to the deponent and said Richards. That said Garr combined and colluded with that individual to devise plans to injure deponent and said Richards, and prejudice their pecuniary and other rights. And deponent means to be understood that said Garr made use of and revealed the said confidential communications, as one of the means by which he and the said individual were to accomplish the said object; and that the said Garr has grossly violated his duty to the deponent and the said Richards, in the transaction of the said litigations and business.”











To this declaration the defendant demurred, and assigned the following causes of demurrer: 1. That it does not appear that the libel was ever published. 2. That the declaration charges no specific offence against the defendant. 3. That the affidavit alleged to be libellous was part of a judicial proceeding, and was relevant and pertinent thereto. 4. That it does not appear by the declaration that the matter alleged to be libellous was published with malice, nor that it was false, nor that it was not pertinent and relevant. 5. That the affidavit was a privileged communication, and cannot by any possibility be a libel. 6. That the plaintiff's only remedy is by a special action on the case, in the nature of an action for malicious prosecution.

*C. W. Sandford*, for the plaintiff. *P. Y. Cutler*, for the defendant.

By the court, EDMONDS, J. To impute to a professional man ignorance or want of skill in a particular transaction is not actionable. To be actionable, words of that character must be spoken or written of him generally. It is not so, however, of words which impute want of integrity. They are actionable, whether used generally of his profession, or particularly as to some one transaction. The words in this case impute want of integrity, and are actionable *per se*.

It is averred that they were pertinent to the matter in hand, and therefore privileged. But in the mean time the court avers that they were used maliciously, and were not pertinent. If so, they were not privileged, but actionable; and we cannot hold, as the demurrer claims, that these words, thus used maliciously and not pertinent, are not actionable.

The demurrer must be overruled, with leave to amend, on payment of costs.<sup>1</sup>

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## SECOR v. HARRIS.

SUPREME COURT, NEW YORK, SEPTEMBER, 1854.

[Reported in 18 Barbour, 425.]

MOTION by the plaintiff for a new trial, upon a bill of exceptions.

*F. U. Fenno*, for the plaintiff. *W. B. Hawes*, for the defendant.

MASON, J. This is an action for slander. Upon the trial of the cause the plaintiff proved the following words, which were also alleged in the complaint: "Doctor Secor killed my children." "He gave them teaspoonful doses of calomel, and they died." "Dr. Secor gave them teaspoonful doses of calomel, and it killed them; they did not live

<sup>1</sup> *Sumner v. Uteley*, 7 Conn. 257, acc. — ED.

long after they took it. They died right off,—the same day.” The plaintiff was proved to be a practising physician, and the evidence shows that he had practised in the defendant’s family, and had prescribed for the defendant’s children, and that the words were spoken of him in his character of a physician. The plaintiff claimed that the words were actionable, and that he was entitled to have this branch of the case, upon the words, submitted to the jury. The judge at the circuit held that the words were not actionable, and took them from the consideration of the jury. These words, spoken of the plaintiff as a physician, are actionable *per se*, whatever may be said upon the question, whether they impute a criminal offence. They do not impute a criminal offence, unless there is evidence, arising from the quantity of the calomel which the defendant alleged that the plaintiff gave these children, from which a jury would be justified in finding an intention to kill them. One of them was three years of age, and the other one year and a half. If the natural result, which should reasonably be expected from feeding children of such tender years full teaspoon doses of calomel, would be certain death, then it is not a forced construction of the words to say that the defendant intended to charge the plaintiff with an intention to kill these children, in giving them such doses. It is not necessary, however, to say that the judge should have submitted this case to the jury upon the question, whether the defendant did not intend to impute to the plaintiff, by these words, a criminal offence. I am quite inclined to think, however, that had the judge submitted the case to the jury upon the imputation of a criminal intent in these words, and had the jury found that such intent was imputed, we should not be justified in setting aside their verdict. It is not necessary, however, to place the case upon this ground; for it is certainly slanderous to say of a physician that he killed these children of such tender years, by giving them teaspoonful doses of calomel. The charge, to say the least, imports such a total ignorance of his profession as to destroy all confidence in the physician. It is a disgrace to a physician to have it believed that he is so ignorant of this most familiar and common medicine, as to give such quantities thereof to such young children. The law is well settled that words published of a physician, falsely imputing to him general ignorance or want of skill in his profession, are actionable, in themselves, on the ground of presumed damage. *Starkie on Slander*, 100, 110, 115, 10, 12; *Martyn v. Burlings*; <sup>1</sup> *Bacon’s Abr.* title *Slander*, B; *Watson v. Van Derlash*; <sup>2</sup> *Tutler v. Alwin*; <sup>3</sup> *Smith v. Taylor*; <sup>4</sup> *Sumner v. Utley*.<sup>5</sup> I am aware

<sup>1</sup> Cro. Eliz. 589.<sup>2</sup> Hetl. 69.<sup>3</sup> 11 Mod. R. 221.<sup>4</sup> 1 New R. 196.<sup>5</sup> 7 Conn. R. 257.









that it was held, in the case of *Poe v. Mondford*, that it is not actionable to say of a physician, "He hath killed a patient with physic;" and that, upon the strength of the authority of that case, it was decided in this court in *Foot v. Brown*,<sup>1</sup> that it was not actionable to say of an attorney or counsellor, when speaking of a particular suit, "He knows nothing about the suit; he will lead you on until he has undone you." These cases are not sound. The case of *Poe v. Mondford* is repudiated in Bacon's Abr. as authority, and cases are referred to as holding a contrary doctrine (vol. ix. pages 49, 50). The cases of *Poe v. Mondford*, and of *Foot v. Brown*, were reviewed by the Supreme Court of Connecticut, in the case of *Sumner v. Utley*,<sup>2</sup> with most distinguished ability, and the doctrine of those cases repudiated. In the latter case it is distinctly held, that words are actionable in themselves, which charge a physician with ignorance or want of skill in his treatment of a particular patient, if the charge be such as imports gross ignorance or unskillfulness. To the same effect is the case of *Johnson v. Robertson*,<sup>3</sup> where it was held that the following words spoken of a physician in regard to his treatment of a particular case, "He killed the child by giving it too much calomel," are actionable in themselves; and such is the case of *Tutler v. Alwin*,<sup>4</sup> where it was held to be actionable to say of an apothecary, that "he killed a patient with physic." See also 3 Wilson's R. 186; Bacon's Abr. title Slander, letter B, 2, vol. ix. page 49 (Bouv. ed.). The cases of *Poe v. Mondford* and *Foot v. Brown* have been repudiated by the highest judicial tribunal in two of the American States, while the case of *Poe v. Mondford* seems to have been repudiated in England; and I agree with Clinch, J., that the reason upon which that case is decided is not apparent. I do not go the length to say that falsehood may not be spoken of a physician's practice, in a particular case, without subjecting the party to this action. A physician may mistake the symptoms of a patient, or may misjudge as to the nature of his disease, and even as to the powers of medicine, and yet his error may be of that pardonable kind that will do him no essential prejudice, because it is rather a proof of human imperfection than of culpable ignorance or unskillfulness; and where charges are made against a physician that fall within this class of cases, they are not actionable, without proof of special damages. 7 Conn. R. 257. It is equally true, that a single act of a physician may evince gross ignorance, and such a total want of skill, as will not fail to injure his reputation, and deprive him of general confidence. When such a

<sup>1</sup> 8 Johns. 64.<sup>3</sup> 8 Porter's R. 486.<sup>2</sup> 7 Conn. R. 257.<sup>4</sup> 11 Mod. R. 221.



charge is made against a physician, the words are actionable *per se*. 7 Conn. R. 257. The rule may be laid down as a general one that, when the charge implies gross ignorance and unskilfulness in his profession, the words are actionable *per se*. This is upon the ground that the law presumes damage to result, from the very nature of the charge. The law in such a case lays aside its usual strictness; for when the presumption of damage is violent, and the difficulty of proving it is considerable, the law supplies the defect, and, by converting presumption into proof, secures the character of the sufferer from the misery of delay, and enables him at once to face the calumny in open court. Starkie on Slander, 581. It was well said by the learned Chief Justice Hosmer, in Sumner v. Utley,<sup>1</sup> that, "As a general principle, it can never be admitted that the practice of a physician or surgeon in a particular case may be calumniated with impunity, unless special damage is shown. By confining the slander to particulars, a man may thus be ruined in detail. A calumniator might follow the track of the plaintiff, and begin by falsely ascribing to a physician the killing of three persons by mismanagement, and then, the mistaking of an artery for a vein, and thus might proceed to misrepresent every single case of his practice, until his reputation should be blasted beyond remedy. Instead of murdering character by one stroke, the victim would be cut successively in pieces, and the only difference would consist in the manner of effecting the same result." It is true, as was said by the learned Chief Justice Hosmer in that case, the redress proposed, on the proof of special damage, is inadequate to such a case. Much time may elapse before the fact of damage admits of any evidence; and then the proof will always fall short of the mischief. In the mean time the reputation of the calumniated person languishes and dies; and hence, as we have before said, the presumption of damage being violent, and the difficulty of proving it considerable, the law supplies the defect by converting presumption of damage into proof: Starkie on Slander, 581; in other words, the law presumes that damages result from the speaking of the words. In the case under consideration, the words proved impute to the plaintiff such gross ignorance of his profession, if nothing more, as would be calculated to destroy his character wherever the charge should be credited. It would be calculated to make all men speak out and say, as did the witness Richard Morris, "that it was outrageous, and the plaintiff ought not to be permitted to practise." The law will therefore presume damages to result from the speaking of the words, and consequently hold the words actionable in themselves. The

<sup>1</sup> 7 Conn. R. 257.









judge at the circuit erred in taking this branch of the case from the consideration of the jury, and a new trial must be granted; costs to abide the event of the action.

CRIPPEN, J., concurred. SHANKLAND, J., dissented.

*New trial granted.*<sup>1</sup>

<sup>1</sup> Johnson *v.* Robertson, 8 Port. (Ala.) 486; Sumner *v.* Utley, 7 Conn. 257, acc. See Watson *v.* Vanderlash, Hetl. 71; Edsall *v.* Russell, 4 M. & Gr. 1090.

Foot *v.* Brown, 8 Johns. 64, *contra.* Conf. Camp *v.* Martin, 23 Conn. 89. — ED.

*Slander — (continued).*

(c) WORDS IMPUTING A LOATHSOME DISEASE.

## AUSTIN v. WHITE.

IN THE QUEEN'S BENCH, HILARY TERM, 1591.

[Reported in *Croke's Elizabeth*, 214.]

ACTION for these words: "Thou wert laid of the French pox," adjudged actionable. And FENNER said it was adjudged in this court that for these words, "thou wert laid of the pox," action did lie; for it cannot be intended but of the French pox.<sup>1</sup>

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## BURY v. CHAPPELL.

IN THE —, HILARY TERM, 1601.

[Reported in *Goldsborough*, 135.]

BURY brought an action upon his case for words against Chappell, viz., "He hath been in Fowler's tub" (*innuendo* the tub of one Fowler, a chirurgeon, in which tub no person had been but those which were laid of the pox); "I will not say of the pox, but he lay in the tub that time that Lagman his wife was laid of the pox; and tell thy master his hair falls from his head, and he is a pilled knave, and a rascal knave, and a villain, and no Christian, and thinks there is neither heaven nor hell;" and adjudged that the action is not maintainable.<sup>2</sup>

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## TAYLOR v. PERKINS.

IN THE KING'S BENCH, HILARY TERM, 1607.

[Reported in *Croke's James*, 144.]

ACTION for these words: "Thou art a leprous knave." It was demurred upon the declaration, because the defendant conceived an

<sup>1</sup> Anon., Ow. 34; *Hobson v. Hudson*, Sty. 199, 219, acc. — Ed.

<sup>2</sup> *Hunt v. Jones*, Cro. Jac. 499; *Califord v. Knight*, Cro. Jac. 514; *James v. Rutlech*, 4 Rep. 17 a, acc. — Ed.











action lay not for these words. But upon the first motion all the court held, that the action well lay, for they are as well actionable as if he had said, "Thou wast laid of the pox." Wherefore, without argument, it was adjudged for the plaintiff.

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## SMITH v. HOBSON.

IN THE KING'S BENCH, TRINITY TERM, 1647.

*[Reported in Style, 112.]*

SMITH, an innkeeper in Warwick, brought an action upon the case against Hobson for speaking these words: "Colonel Egerton had the French pox, and hath set it in the house" (meaning the plaintiff's house), "and William Smith and his wife" (meaning the plaintiff and his wife) have it, and all you." The plaintiff hath a verdict. The defendant moves in arrest of judgment, and for cause shows, that the words are not actionable; for the words are, that Colonel Egerton hath set the French pox in the house, which is impossible; for the house could not have the pox, and the words, "William Smith and his wife have it," shall not be meant that they have the pox, but the house, for that is the next antecedent to the words, to which they shall refer. And also where words are spoken doubtfully, whether they be spoken true or false, they shall be taken to be true; and it may be here the words are true, and then no action lies for speaking of them; also the baron and feme ought to join in the action, if they be actionable, for they are spoken to both their prejudice, and the action is not to be brought by the husband alone, as here it is. Also, in this case the words being spoken of a house, the writ of inquiry of damages must be what damages is come to the house, which cannot be. ROLL, J., If an action be brought for words, and part of them be actionable, and part are not, yet an action lies for them which are actionable. And in this case the husband alone may bring the action for damages to himself, and he may afterwards bring another action for the damages done to his wife; and he held the words here actionable, and bid the plaintiff take his judgment, if cause were not shown to the contrary Saturday following. Judgment was afterwards given accordingly.<sup>1</sup>

<sup>1</sup> Davies v. Taylor, Cro. El. 648; Garford v. Clerk, Cro. El. 857; Miller's Case, Cro. Jac. 430; Crittal v. Horner, Hob. 219; Elyott v. Blagen, Sty. 283; Marshall v. Chickall, 1 Sid. 50; Commings's Case, 2 Sid. 5, acc. — ED.

## LYMBE v. HOCKLY.

IN THE KING'S BENCH, HILARY TERM, 1667.

[Reported in 1 *Levinz*, 205.]

CASE for saying of the plaintiff, "He has got the pox of a yellow-haired wench in Moorfields." After verdict for the plaintiff, it was moved in arrest of judgment that saying one has got the pox is not actionable, because not scandalous, it being intended the small-pox. 4 Co. 17. But, 3 Cro. 214, laid of the pox, is actionable; and so is rotted of the pox, 3 Cro. 648, because intended the French pox. But by THE COURT, it being here said that he had got them of a yellow-haired wench, it is actionable; for wench in common speech is taken for a whore, and therefore it shall be intended the French pox. And TWISDEN and MORETON held, that so it would be if the words had been that he had got them of a yellow-haired woman.<sup>1</sup>

## TAYLOR v. HALL.

IN THE KING'S BENCH, TRINITY TERM, 1743.

[Reported in 2 *Strange*, 1189.]

THE COURT held that it was not actionable to say the plaintiff had had the pox. For it is avoiding him for fear of contagion, and refusing to keep him company, that is the legal notion of damage; and when he is cured, those inconveniences will not attend him. And judgment was arrested.<sup>2</sup>

## CARSLAKE v. MAPLEDORAM.

IN THE KING'S BENCH, APRIL 27, 1788.

[Reported in 2 *Term Reports*, 473.]

THE defendant libelled the plaintiff in the Archdeacon's Court of Exeter, for speaking the following words of her: "I have kept her common these seven years; she hath given me the bad disorder, and three or four other gentlemen besides;" thereby meaning that the said

<sup>1</sup> *Brook v. Wife*, Cro. El. 818; *Grimes v. Lovel*, Ray. 446; *Clifton v. Wells*, Ray. 710; *Whitfield v. Powell*, 12 Mod. 248, acc. — Ed.

<sup>2</sup> *Smith's Case*, Noy, 157; *Dutton v. Eaton*, All. 31, acc. — Ed.











Mapledoram was a whore. A prohibition was moved for in the last term after sentence, on the ground that the words spoken were actionable.

*Gibbs* now showed cause against the prohibition. This application is made after sentence; and therefore, unless it appear on the face of the proceedings that the court below had no jurisdiction over the subject-matter, a prohibition ought not to be granted. Now these words are not actionable in themselves, even if the charge related to the present time; and a declaration without *innuendos* to explain the meaning of them would be bad. For there are many disorders which may be termed bad disorders, but the having of which would not render the person an unfit person of society, or be any imputation on him; a bad disorder does not necessarily mean a contagious one. But even supposing that it did, still these words only refer to a time past, and therefore are not actionable. There are two grounds on which words are actionable, as producing a temporal damage: first, charging a person with having committed a crime, for which he may be afterwards punished; and, secondly, charging a person with having at the time a contagious disorder. Charging a man with the first of these at a time past is actionable, because he is liable to punishment at any distance of time; but the latter charge does not subject the person making it to an action, unless it be confined to the present time, since the having had a contagious disorder is no reason why his society should be avoided in future.

*Franklin*, in support of the rule. The words are actionable without any *innuendo*; they sufficiently import a contagious disorder, since the plaintiff below is charged with having communicated it to the defendant himself, and to three or four other persons. In answer to the second ground of objection, it cannot be collected that this charge relates to a time past; it is not that the plaintiff below had had this disorder, but the words charge her with having it at the time. But even if the charge did relate to a time past, still these words are actionable. In *Austin v. White*, these words, "thou wert laid of the French pox," were adjudged actionable. In *Miller's Case*,<sup>1</sup> *Backter's Case* is mentioned, where the words, "thou wast laid of the pox," were held actionable. So in *Hob. 219*, "that he had caught it, and had carried it home to his wife." In these cases the words clearly refer to a time past. So that it appears upon the libel itself that the court below had no jurisdiction.

*ASHMURST, J.* No sufficient ground has been laid before the court to induce us to interpose in this case, and grant a prohibition. This is an

<sup>1</sup> Cro. Jac. 430.

application after sentence has been pronounced in the court below; and it seems, on the whole, that the court below had a jurisdiction over the subject-matter. If the plaintiff had called the defendant a whore, such a charge would have given the court below a jurisdiction; and these words, "he hath kept her common these seven years," are tantamount to it. Then, notwithstanding the latter words, if the Archdeacon's Court had a jurisdiction as to part of the charge, these latter words would not make any difference. As to those, the distinction has been properly taken. Charging a person with having committed a crime is actionable, because the person charged may still be punished; it affects him in his liberty. But charging another with having had a contagious disorder is not actionable; for unless the words spoken impute a continuance of the disorder at the time of speaking them, the gist of the action fails; for such a charge cannot produce the effect which makes it the subject of an action, namely, his being avoided by society. Therefore, unless some special damage be alleged in consequence of that kind of charge, the words are not actionable. That seems to be the case in all the instances mentioned except one, where the words were, "thou wert laid of the pox;" but that seems unintelligible from the report of the case, which is very loosely reported, and therefore it is not much to be relied on. But, on principle, these words are clearly not actionable, if spoken with a reference to time past; and in this case I think they do relate to past time.

BULLER, J. After sentence, it is incumbent on the party making this application to show clearly that the spiritual court had no jurisdiction. If, therefore, it be doubtful, it is an answer to the application. Now, in this case it is taking the words against their natural import to suppose that they were spoken of the present time. If they relate to time past, I do not think they are actionable. There is no distinction between a charge of this sort, and a charge of the leprosy, which is to be found in the old books. In those cases, it is said that a charge of having had such a disorder is no imputation on another, since it does not subject him to any of the inconveniences attending the having such a disease; so of all other diseases which are contagious. The reason why the making of such a charge is actionable is because the having a contagious disorder renders the person an improper member of society; but there is no reason why the company of a person who has had a contagious disorder should be avoided, and therefore such a charge is not actionable. The case in *Cro. Eliz.* which has been cited is too loosely reported to be relied on.

GROSE, J., of the same opinion.

*Rule discharged.*<sup>1</sup>

<sup>1</sup> *Nichols v. Guy*, 2 Ind. 82; *Pike v. Van Wormer*, 5 How. Pr. R. 171; *Irons v. Field*, 9 R. I. 216, acc. — ED.









## BLOODWORTH v. GRAY.

IN THE COMMON PLEAS, APRIL 19, 1844.

[Reported in 7 Manning &amp; Granger, 334.]

CASE for defamation. The first count, after stating the intention of the defendant to be to cause it to be suspected and believed that the plaintiff, at the time of the committing, &c., was infected with the French pox, otherwise called the venereal disease, laid the words as follows: "He" (meaning the plaintiff) "has got that damned pox" (meaning the French pox, otherwise called the venereal disease), "from going to that woman on the Derby Road." In the second count the words alleged were, "Ah! that damned fellow Bloodworth! I am credibly informed that he has got the pox." In the third count, "He has got it" (meaning, &c.).

The declaration laid as special damage that one Palmer, who had been surety for the plaintiff for the rent of his farm, had, in consequence of the slander, withdrawn from his suretyship; and that, by means of the premises, the plaintiff's wife died, whereby the plaintiff had lost her comfort, assistance, and services; and the plaintiff fell sick and underwent great pain of body, &c. Plea: Not guilty.

At the trial of the cause before Gurney, B., at the last Leicestershire assizes, it appeared that the plaintiff, who was a farmer, was the son-in-law of the defendant, a major-general on half pay, and that the marriage had taken place without his consent. The words were proved as laid, but the proof of special damage wholly failed. It was contended, on the part of the defendant, that the words were not actionable *per se*; but the objection was overruled, and plaintiff recovered a verdict with £50 damages; leave was, however, reserved to the defendant to move to enter a nonsuit.

Channell, Serjt., now moved accordingly; but he admitted the authorities were against him. He referred to Com. Dig. tit. Action upon the Case for Defamation, D, 29, and *Carslake v. Mapledoram*.

TINDAL, C. J. This case falls within the principle of the old authorities.

*Per curiam. Rule refused.*<sup>1</sup>

<sup>1</sup> *Watson v. McCarthy*, 2 Ga. 57; *Nichols v. Guy*, 2 Ind. 82; *Golderman v. Stearns*, 7 Gray, 181; *Williams v. Holdross*, 22 Barb. 396; *Hewit v. Mason*, 24 How. Pr. 366; *Irons v. Field*, 9 R. I. 216, acc. — ED.



## "GEORGE, THE COUNT JOANNES" v. BURT.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, JANUARY TERM,  
1863.

[*Reported in 6 Allen, 336.*]

TORT brought in the name of "George, the Count Joannes," seeking to recover damages of the defendant for slander. The declaration was as follows:—

"First count. And now comes the plaintiff, and avers and declares that he is by professional vocations a public author of historical and other literary works, and a public lecturer, and public oratorical illustrator of the sacred Scriptures, and the works of Shakespeare, for reputation, income, profits, and emoluments, as exemplified by the annexed exhibit A;<sup>1</sup> and also special attorney, counsellor, and advocate, practising by special authority, and by the laws, in the Supreme Judicial Court and the Superior Court of Massachusetts, also, for reputation, income, profits, and emoluments; and in any and all of said intellectual employments; the unimpaired reason and the reasoning powers of plaintiff are a condition precedent for plaintiff's said public employments; their continuance; and for his reputation, his income, profits, and emoluments. And the plaintiff further avers and declares that the defendant is an attorney and counsellor-at-law of Massachusetts, and a justice of the peace for the county of Suffolk, of great practice in his legal profession, and learned in the law, and of enlarged influence in public and in society. And the plaintiff further avers and says that defendant is an avowed enemy of the plaintiff upon a vital question of this republic. The treasonable motto of defendant's political and abolition creed, to wit, 'The constitution of the United States is a compact with hell,' plaintiff has denounced in three public orations at Faneuil Hall, Boston (and before several thousands of his fellow-citizens), as traitorous to the constitution and to the government of this republic; and thence the abolitionists are the avowed and malicious enemies of plaintiff; and of which abolitionists the defendant is one, and a public supporter of that *ultra* and sanguinary creed. And the plaintiff further says that the defendant, at Boston, in the county of Suffolk, on or about the fifth day of February, A.D. one thousand

<sup>1</sup> This was a printed circular, addressed "to committees of lyceums," &c., stating in detail the "Public Orations and Discourses, written and pronounced in Europe and America by 'George Jones,' the Count Joannes, Imperial Count Palatine," and offering to pronounce them in the New England States for one hundred dollars each, and his travelling expenses, and giving a list of gentlemen who had signed letters of invitation to him.









eight hundred and sixty-two, and in the presence and hearing of a large assembly of citizens, did publicly, falsely, and maliciously, and without reasonable and probable cause, and not being pertinent to the judicial inquiry at issue, accuse the plaintiff with being insane; with being possessed in his own proper person with the contagious disease of insanity; by words spoken publicly by defendant of and concerning plaintiff, and substantially in matter as follows, to wit, 'I' (meaning defendant) 'now, gentlemen of the jury, shall speak upon a delicate subject; and will say that, for which I run the hazard of legal proceedings on the part of the plaintiff in this action' (meaning the action *Joannes v. Nickerson*, then being tried in the Superior Court, county of Suffolk; and by the word 'plaintiff,' meaning the present plaintiff). 'It is, that he' (pointing and looking at and meaning this plaintiff) 'is insane. I' (meaning defendant) 'can liken him' (meaning plaintiff) 'only to Pratt and Mellen, two madmen well known in this community.' (Here followed by defendant a description of the said citizens, Pratt and Mellen, one or both of whom had been secured and placed in a lunatic asylum for insane persons, as being confirmed and dangerous madmen.) 'If the plaintiff' (meaning this plaintiff) 'had justice done him, a jury' (meaning a jury sworn to inquire into any case of lunacy) 'would consign him' (meaning plaintiff) 'to an insane hospital, and not find a verdict in this action in his favor, and against my client' (meaning the then defendant, Joseph Nickerson, Esq., in the action then being tried).

"Second count. And the plaintiff says that the defendant, at Boston, in the county of Suffolk, on or about Wednesday, the fifth day of February, A.D. one thousand eight hundred and sixty-two, in the presence and hearing of a large public assembly of citizens, to wit, two hundred (more or less), did publicly, falsely, and maliciously, and without reasonable and probable cause, and not pertinent and material to the issue upon the aforesaid judicial trial (but maliciously impertinent to said issue), accuse, charge, and publicly denounce the plaintiff with being insane; with being diseased and possessed in plaintiff's own proper person with the most terrible of God's inflictions upon mankind, that of the infectious and transmissible physical and mental disease of insanity; which accusation, if true, as falsely and maliciously slandered by defendant, would deprive plaintiff of his personal liberty; of all personal, legal, and social rights whatever; of all income and emoluments from his professional employments; of all future public advancements and domestic happiness; casting desolation, misery, and sorrow upon plaintiff, and increasing his sufferings by the sad reflection that the slander upon the father also slanderously taints the mental condition of plaintiff's children; and to give additional force and injury to the

wounded feelings of the plaintiff, and as a climax to the malice of the defendant, he publicly made the said accusation, even in the presence and hearing of the wife of the plaintiff, and which false and malicious accusation the defendant well knew, when he uttered it, to be totally untrue, atrocious, actionable, and most malignant in its mendacity.

"In consideration, therefore, of the foregoing premises, the plaintiff brings this action of tort; and claims to his damage the sum of ten thousand dollars.

"Respectfully,

"GEORGE, THE COUNT JOANNES,  
"Plaintiff in person."

To this declaration the defendant demurred, as not setting forth any legal cause of action, as containing irrelevant and improper matter, and as having annexed to it a printed exhibit not pertaining to the cause of action.

At the hearing in this court, before Hoar, J., the demurrer was sustained, and judgment rendered for the defendant; and the plaintiff appealed to the whole court.

The plaintiff and the defendant both appeared *pro sese*.

HOAR, J. This case comes before us by an appeal from a judgment rendered by a justice of this court on a demurrer. This is irregular; the proper mode, in actions at common law, being by bill of exceptions, where the case is not reserved. But, the appeal having been allowed by the justice who rendered the judgment, we have examined the questions presented, and are of opinion that the judgment sustaining the demurrer was right.

The declaration is in tort for slander, by orally imputing insanity to the plaintiff. We are aware of no authority for maintaining such an action, without the averment of special damage. The authorities upon which the plaintiff relies are both cases of libel. *The King v. Harvey*; <sup>1</sup> *Southwick v. Stevens*.<sup>2</sup> An action for oral slander, in charging the plaintiff with disease, has been confined to the imputation of such loathsome and infectious maladies as would make him an object of disgust and aversion, and banish him from human society. We believe the only examples which adjudged cases furnish are of the plague, leprosy, and venereal disorders.

In addition to this vital objection in matter of substance, the declaration fails to set forth the supposed cause of action in substantial conformity with the requirements of the statute; and contains many superfluous allegations, which are manifestly irrelevant, impertinent, and scandalous.

*Appeal dismissed.*

<sup>1</sup> 2 B. & C. 257.

<sup>2</sup> 10 Johns. 443.











*Slander — (continued).*(d) DEFAMATORY WORDS NOT ACTIONABLE *per se*, BUT CAUSING SPECIAL DAMAGE.

## DAVIS v. GARDNER.

IN THE COMMON PLEAS, TRINITY TERM, 1593.

[Reported in 4 Reports, 16 b.]

THE plaintiff declared that she was a virgin of good fame, &c., and free from all suspicion of incontinency, &c. And whereas Anthony Elcock, citizen and mercer of London, of the substance and value of £3000, desired her for his wife, and had thereupon conferred with John Davis, her father, and was ready to conclude it, the defendant (*præmissorum non ignarus*) to defame the said Anne, and to obstruct the said Anthony's proceeding, uttered and published of the said Anne these words: "I know Davis's daughter well (*innuendo præd' Annam*); she dwelt in Cheapside, and there was a grocer that did get her with child (and the defendant being there then admonished that he should be advised *quid dixerat de præfata Anna*) *ulterius de eadem dixit*: "I know very well what I say, I know her father and mother, and sister, and she is the youngest sister, and had the child by the grocer:" by reason of which words the plaintiff was greatly defamed, *et ratione inde dict' Anthonius ipsam Annam in uxor' ducere penitus recusabat*; and the defendant pleaded not guilty, and by *Nisi Prius* in the county of Bucks, the jurors found for the plaintiff, and assessed damages to 200 marks. And it was now moved in arrest of judgment by the defendant's counsel, that the said defamation of incontinency concerned the spiritual and not the temporal jurisdiction; and therefore as the offence should be punished in the spiritual court, so her remedy for such defamation should be there also; for *cognitio causæ non spectat ad forum regium*; so if a man is called bastard, or heretic, or miscreant, or adulterer (forasmuch as these belong to the ecclesiastical jurisdiction), no action lies at the common law; and in proof thereof, 12 H. 7, 22, *a, b*, and 27 H. 8, 14, *a, b*, were cited. But it was answered by the plaintiff's counsel, and resolved *per totam curiam*, that the action was maintainable, for two reasons: 1. Because if the woman had a bastard, she was punishable by the statute of 18 Eliz. c. 3. And although fornication or adultery is not examinable by our law, because they are done in secret, and peradventure are indecent to be openly examined, yet the having of a bastard is a thing apparent, and examinable and punishable by the said act. 2. It was

resolved, if the defendant had charged the plaintiff with bare incontinency, yet the action should be maintainable; for in this case the ground of the action is temporal, that she was to be advanced in marriage, and that she was defeated of it, and the means by which she was defeated was the said slander, which means tending to such end, shall be tried by the common law. So if a divine is to be presented to a benefice, and one to defeat him of it says to the patron "that he is a heretic, or a bastard, or that he is excommunicated," by which the patron refuses to present him (as he well might if the imputations were true), and he loses his preferment, he shall have his action on the case for those slanders tending to such end. And if a woman is bound that she shall live continent and chaste; or if a lease is made to her *quamdiu casta vixerit*, — in these cases incontinency shall be tried by the common law. And Popham, C. J., said, that if one says of a woman that keeps an inn, that she has a great infectious disease, by which she loses her guests, she shall have an action on the case. Trin. 25 Eliz. in B. R., *inter* Banister & Banister, it was resolved, that where the defendant said of the plaintiff (being son and heir to his father) that he was a bastard, that an action on the case lies; for it tends to his disinherison of the land which descends to him from his father; but there it was resolved that if the defendant pretends that the plaintiff was a bastard, and that he himself was the next heir, there no action lies, and that the defendant may show by way of bar, if the plaintiff omits it in his declaration; which agrees with the resolution in *Anne Davis's Case*, and with the *Lord Cromwel's Case*.<sup>1</sup>

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### SHEPPARD v. WAKEMAN.

IN THE KING'S BENCH, HILARY TERM, 1662.

[Reported in 1 *Levinz*, 58.]

CASE where the plaintiff was to be married to such a one who intended to take her to his wife; the defendant falsely and maliciously, to hinder the marriage, wrote a letter to the said person, that the plaintiff was contracted to him, whereby she lost her marriage. After verdict for the plaintiff, it was moved that the action did not lie, the defendant claiming title to her himself, like as *Gerrard's Case*, 4 Co., for slander of title. But after divers motions, the plaintiff had judg-

<sup>1</sup> *Dame Morrison's Case*, Jenk. 316; *Matthew v. Crasse*, 2 Bulst. 89; *Sell v. Facy*, 2 Bulst. 276; s. c. 3 Bulst. 48; *Nelson v. French*, Cro. Jac. 422; *Tomson's Case*, Bendl. 148; *Countess of Salop's Case*, Bendl. 155; *Taylor v. Tolwin*, Latch, 218; *Wicks v. Shepherd*, Cro. Car. 155; *Southold v. Daunston*, Cro. Car. 269, acc. See *Bridge v. Taylor*, Litt. 193; *Norman v. Simons*, 1 Vin. Abr. Act. Words, D, a, 12. — Ed.











ment, for it is found to be malicious and false; and if such an action should not lie, a mean and a base person might injure any person of honor and fortune by such a pretence.

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## KELLY v. PARTINGTON.

IN THE KING'S BENCH, NOVEMBER 14, 1833.

[Reported in 5 Barnewall &amp; Adolphus, 645.]

**SLANDER.** The declaration began with the usual averment of the plaintiff's good conduct and character, and stated that the defendant, contriving and intending to injure the plaintiff in her good name, &c., as a shopwoman and servant, falsely and maliciously spoke certain words mentioned in the first count. The second count stated that the defendant, further contriving and intending as aforesaid, falsely and maliciously spoke and published of and concerning her, as such shopwoman and servant, these other false, scandalous, malicious, and defamatory words following, that is to say, "She" (meaning the plaintiff) "secreted 1s. 6d. under the till, stating, these are not times to be robbed." The declaration concluded with an allegation of special damage, that one Stenning, by reason of the speaking of the words, refused to take the plaintiff into his service.<sup>1</sup> The jury found a general verdict for the plaintiff, with 1s. damages.

*Sir James Scarlett* obtained a rule *nisi* for arresting the judgment, on the ground that the words in the second count, taken in their grammatical sense, were not disparaging to the plaintiff, and therefore that no special damage could result from them.

The *Solicitor-General*, in Hilary term following, showed cause. The words in the second count (as the court has already decided) are not actionable without special damage. The question is, whether they are actionable, even with special damage. [DENMAN, C. J. It is contended that the words import that the plaintiff secreted her own money from excessive caution.] The words may not be actionable of themselves; but such words, if a jury find them to have been spoken with a malicious intent to injure the plaintiff, as charged in this declaration, are actionable by reason of special damage. Comyns, C. B., in his Digest, tit. Action on the Case for Defamation, D, 30, after having stated, under the previous heads, many instances of words actionable in themselves, says that an action may be maintained "for any words by which the party has a special damage." Even, therefore, if the words in question bore the sense ascribed to them, yet being spoken falsely and maliciously with intent to injure, and followed by special

<sup>1</sup> See *Kelly v. Partington*, 4 B. & Ad. 700.

damage, they are actionable. And these were in fact not innocent, but disparaging words, or at all events equivocal; and it was for a jury to find in what sense they were used. The word "secreted" is used in a bad sense; it usually imputes some bad motive. If the words, "stating, these are not times to be robbed," apply to the plaintiff, they are ambiguous; they may have been used by her as a pretence for secret-ing money belonging to another, and that question was for the jury. [LITTLEDALE, J. Suppose a man had a relation of a penurious disposition, and a third person, knowing that it would injure him in the opinion of that relation, tells the latter a generous act which the first has done, by which he induces the relation not to leave him money, would that be actionable?] If the words were spoken falsely with intent to injure, they would be actionable. At all events, if the words are not laudatory, but will bear a bad sense, and a jury might find (as they did here) that they were used in that sense, and an injury is stated to have ensued in consequence, they are actionable.

*Sir James Scarlett*, contra. It does not appear by the words themselves, or by any *innuendo*, whose property the 1s. 6d. was. It may have been that of the plaintiff; and if so, it is clear that the words do not import a charge of felony. They cannot amount to such a charge, unless it be assumed that the property meant was that of the defendant or some third person. It is not true that an action may be maintained for words of praise (not used ironically), if followed by special damage. No case can be cited to that effect. An action is only maintainable for special damage when it is the natural result of a wrongful act. The uttering of words not defamatory of another is not wrongful, and, therefore, even when followed by special damage, gives no ground of action. The words being innocent in themselves, there is no ground for presuming malice, and a jury cannot infer it.

DENMAN, C. J. The declaration alleges that the defendant, intending to injure the plaintiff, maliciously spoke these words: "She" (the plaintiff) "secreted 1s. 6d. under the till, stating that these are not times to be robbed;" by reason whereof a damage ensued to the plaintiff. The words do not of necessity import any thing injurious to the plaintiff's character; and we think that the judgment must be arrested, unless there be something on the face of the declaration from which the court can clearly see that the slanderous matter alleged is injurious to the plaintiff. Where the words are ambiguous, the meaning may be supplied by *innuendo*; but that is not the case here. The rule for arresting the judgment must therefore be made absolute.

LITTLEDALE, J. I cannot agree that words laudatory of a party's conduct would be the subject of an action if they were followed by special damage. They must be defamatory or injurious in their nature.









In Comyns's Dig. tit. Action on the Case for Defamation, D, 30, it is said generally that any words are actionable by which the party has a special damage; but all the examples given in illustration of that rule are of words defamatory in themselves, but not actionable, because they do not subject the party to a temporal punishment. In all the instances put, the words are injurious to the reputation of the person of whom they are spoken. The words here are extraordinary; if they had stood merely, "she secreted 1s. 6d. under the till," they might perhaps have been actionable; but, coupled with the subsequent words, which appear only to import great caution on the part of the plaintiff, I think we cannot say that they impute any thing injurious to the plaintiff.

TAUNTON, J. I am of the same opinion. The expression ascribed to the plaintiff, "these are not times to be robbed," seems like saying that times are so bad I must hide my money. If Stenning refused to take the plaintiff into his service on this account, he acted without reasonable cause; and in order to make words actionable, they must be such that special damages may be the fair and natural result of them.

PATTESON, J. I have always understood that the special damage must be the natural result of the thing done. The words here are, "The plaintiff secreted 1s. 6d. under the till, stating, these are not times to be robbed." There is no *innuendo* stating whose money it was that she secreted; it might be her own. Then it is said that the words are actionable, because a person after hearing them chose in his caprice to reject the plaintiff as a servant. But if the matter was not in its nature defamatory, the rejection of the plaintiff cannot be considered the natural result of the speaking of the words. To make the speaking of the words wrongful, they must in their nature be defamatory.<sup>1</sup>

*Rule absolute.*<sup>2</sup>

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### MILLER v. DAVID.

IN THE COMMON PLEAS, JANUARY 20, 1874.

[Reported in *Law Reports*, 9 *Common Pleas*, 1187.]

THE first count of the declaration stated that the plaintiff was, at and during the times of the committing by the defendant of the grievances in the several counts mentioned, a working stone-mason residing

<sup>1</sup> See *Vicars v. Wilcocks*, 8 East, 1.

<sup>2</sup> *Hallock v. Miller*, 2 Barb. 632, *semble*, acc.; *Bentley v. Reynolds*, 1 McMull. 16, *semble*, *contra*. — ED.



at Llanelly, in the county of Carmarthen, and sought and earned his livelihood by working as a stone-mason for wages as servant of builders and others employing masons in Llanelly or the neighborhood of Llanelly, and was at the time of the committing of the grievances in that count mentioned so employed in certain works carried on under the management of a person surnamed Mayberry, and before the times of the committing of the grievances in the several counts mentioned three public meetings had been held at Llanelly aforesaid of divers masons, with the object of promoting the adoption in Llanelly aforesaid of a system of labor amongst masons employed there, called "the nine hours system," consisting in, amongst other matters, the diminution of the hours of labor per week theretofore established and in use for masons in Llanelly aforesaid; and the said nine hours system was at the said times considered by the defendant and Mayberry and divers employers of masons in Llanelly aforesaid as inexpedient and prejudicial to divers trades carried on in Llanelly aforesaid, and injurious to the public welfare of Llanelly; and at the said times persons known or suspected to be ringleaders or agitators of the movement in favor of the nine hours system were looked upon with disfavor and suspicion by such employers, who would not readily employ them; and such persons found their means of obtaining employment diminished, — all which the defendant at the said times well knew: yet the defendant falsely and maliciously spoke and published of the plaintiff to Mayberry the words following, that is to say, "He" (meaning the plaintiff) "was the ringleader of the nine hours system;" whereby and by means of which premises the plaintiff was injured in his occupation of a stone-mason, and was discharged from his said employment at the said works, to wit, the Old Castle Iron and Tin Plate Works, and was without and could not obtain employment for a considerable time, and could get no employment but one of less value to the plaintiff, the place of employment being distant from his place of abode, and his necessary meals thereby becoming more costly, and such place of employment being exposed to wet weather.

Second count, for that the plaintiff repeats and reaffirms the said matters of inducement applicable to this count, and says that the defendant falsely and maliciously spoke and published of the plaintiff to one Rees Jenkins, an employer of stone-masons as aforesaid, the following words, that is to say, "He" (meaning the plaintiff) "has ruined the town by bringing about the nine hours system, and he" (meaning the plaintiff) "has stopped several good jobs from being carried out, by being the ringleader of the system at Llanelly;" whereby the plaintiff was injured in his occupation of a stone-mason, and the said Rees Jenkins refused to take him into his employment as









a stone-mason, and the plaintiff was without and could not get employment, &c., as in the first count.

The fifth and sixth counts were similar to the first and second, but alleging the words to have been spoken in the Welsh language.

Demurrer, on the ground that the words were not in themselves defamatory, and that special damage consequent thereon, therefore, gave no action. Joinder in demurrer.

Nov. 20, 1873. *H. Giffard*, Q. C., in support of the demurrer. The words alleged in the counts demurred to to have been spoken of the plaintiff, not being defamatory in their nature, are not actionable, even though followed by special damage. In *Lumby v. Allday*, where the declaration stated that the plaintiff was clerk to a gas company, and that the defendant spoke of him words imputing to him incontinence and consequent unfitness to hold his situation, Bayley, B., delivering the judgment of the court, said: "The objection to maintaining an action upon these words is, that it is only on the ground of the plaintiff being clerk to the company that they can be actionable; that it is not alleged that they are spoken of him in reference to his character or conduct as clerk; that they do not from their tenor import that they were spoken with any such reference; that they do not impute to him the want of any qualification such as a clerk ought to have, or any misconduct which would make him unfit to discharge faithfully and correctly all the duties of such a clerk. The plaintiff relied on the rule laid down by De Grey, C. J., in *Onslow v. Horne*, 'that words are actionable when spoken of one in an office of profit, which may probably occasion the loss of his office; or when spoken of persons touching their respective professions, trades, and business, and do or may probably tend to their damage.' The same case occurs in *Sir W. Bl. 753*, and there the rule is expressed to be, 'if the words be of probable ill consequence to a person in a trade or profession, or an office.' The objection to the rule as expressed in both reports appears to me to be, that the words 'probably' and 'probable' are too indefinite and loose; and, unless they are considered as equivalent to 'having a natural tendency to,' and are confined within the limits I have expressed in stating the defendant's objections, of showing the want of some necessary qualification, or some misconduct in the office, it goes beyond what the authorities warrant. Every authority which I have been able to find either shows the want of some general requisite, as, honesty, capacity, fidelity, &c., or connects the imputation with the plaintiff's office, trade, or business. As at present advised, therefore, I am of opinion that the charge proved in this case is not actionable, because the imputation it contains does not imply the want of any of those qualities which a clerk ought to possess, and because the imputa-

tion has no reference to his conduct as clerk." In *Kelly v. Partington*, the words were, "She" (meaning the plaintiff) "secreted 1s. 6d. under the till, stating, these are not times to be robbed;" and it was held, on motion in arrest of judgment, that the words were not defamatory in their nature, and therefore not actionable, even though followed by special damage. Patteson, J., there says: "I have always understood that the special damage must be the natural result of the thing done. The words here are, 'The plaintiff secreted 1s. 6d. under the till, stating, these are not times to be robbed.' There is no *innuendo* stating whose money it was that she secreted; it might be her own. Then it is said that the words are actionable, because a person, after hearing them, chose in his caprice to reject the plaintiff as a servant. But, if the matter was not in its nature defamatory, the rejection of the plaintiff cannot be considered the natural result of the speaking of the words. To make the speaking of the words wrongful, they must in their nature be defamatory." So, in *Ayre v. Craven*, words imputing adultery to a physician, though alleged to have been spoken of him in his profession, were held not to be actionable without special damage.

In the recent case of *Foulger v. Newcomb*, the law is assumed to be as above stated. The judgment distinguishes that case from *Ayre v. Craven* on the ground that there "the declaration did not set forth in what manner the misconduct was connected with the plaintiff's profession;" whereas, in the case in hand it did. The only case which bears a contrary aspect is *Moore v. Meagher*,<sup>1</sup> where it was held that, if, in consequence of words spoken, the plaintiff is deprived of substantial benefit arising from the hospitality of friends, this is a sufficient temporal damage whereon to maintain an action. Heath, J., there says, "Undoubtedly all words are actionable, if a special damage follows." That clearly could not be maintained at the present day.

*Bray*, contra. The words are charged to have been spoken maliciously, they are in their nature defamatory, and they are alleged to have caused special damage to the plaintiff; consequently they are clearly actionable.

[DENMAN, J. *Cox v. Cooper*,<sup>2</sup> cited in Day's Common Law Procedure Acts (4th ed.), p. 98, seems to be against you. It was there held that section 61 of the Common Law Procedure Act, 1852, does not relieve the plaintiff from showing in his declaration by proper *innuendos* that words not in themselves actionable were used with a specific actionable meaning.]

<sup>1</sup> 1 Taunt. 39.

<sup>2</sup> 12 W. R. 75.











“Any words by which a party has a special damage” are actionable. Com. Dig. Action upon the Case for Defamation, D, 30.

[LORD COLERIDGE, C. J. In *Starkie on Slander* (3d ed.), p. 97, it is said: “In the early part of the reign of Queen Anne, Holt, C. J., observed that, whenever the words tended to take away a man’s reputation, he would encourage actions for them; because so doing would much contribute to the preservation of the peace.<sup>1</sup> And Fortescue observed on this ruling in a subsequent case,<sup>2</sup> that it was also Hale’s and Twisden’s rule; and he thought it a very good one.”]

In *Ayre v. Craven* the action failed because the declaration did not show how the words spoken were connected with the plaintiff’s professional conduct. In *Kelly v. Partington*, Littledale, J., says that, to make defamatory words the subject of an action, they must be followed by special damage; and he goes on: “In Com. Dig. Action upon the Case for Defamation, D, 30, it is said generally that any words are actionable by which the party has a special damage; but all the examples given in illustration of that rule are of words defamatory in themselves, but not actionable, because they do not subject the party to a temporary punishment. In all the instances put, the words are injurious to the reputation of the person of whom they are spoken. I think we cannot say that the words here impute any thing injurious to the plaintiff.” The judgments of the other three judges proceed upon the ground that the special damage alleged was too remote. *Green v. Button* is not distinguishable from the present case. There the defendant falsely and maliciously set up a claim of lien, and thereby induced a third person not to deliver to the plaintiff certain goods which he had purchased and paid for; and it was held that the special damage alleged, viz., the non-delivery of the goods, was sufficiently connected with the wrongful act of the defendant to support the action. Then, the words are defamatory in themselves: they impute to the plaintiff a violation of his moral duty towards his employer.

[LORD COLERIDGE, C. J. The plaintiff is alleged to have done no more than that which Parliament has expressly sanctioned.]

That the words were spoken of the plaintiff in the way of his trade of a mason, is matter of law to be inferred from the circumstances.

[LORD COLERIDGE, C. J. That might and ought to have been averred, but it is not.]

Nobody can doubt that the word “ringleader” is one which is capable of being used in a defamatory and injurious sense; and whether or not it is so used is a question for a jury, not for the court. *Jenner v. A’Beckett*.<sup>3</sup>

<sup>1</sup> *Baker v. Pierce*, 6 Mod. 23.

<sup>2</sup> *Button v. Heyward*, 8 Mod. 24.

<sup>3</sup> *Law Rep.* 7 Q. B. 11.

[DENMAN, J. In that case there was an *innuendo* giving the words a defamatory sense.]

Lord Campbell, C., in the course of the argument in the House of Lords in *Lynch v. Knight*,<sup>1</sup> says: "It must not be laid down as a universal rule that a man cannot maintain an action if he is induced by false representations to do an act which occasions him damage. The real question is, whether under the circumstances his conduct is reasonable, not simply whether it is wrongful." And Lord Wensleydale, in giving his judgment in the same case, says:<sup>2</sup> "Upon this question I am much influenced by the able reasoning of Mr. Justice Christian.<sup>3</sup> I strongly incline to agree with him, that, to make the words actionable by reason of special damage, the consequence must be such as, taking human nature as it is, with its infirmities, and having regard to the relationship of the parties concerned, might fairly and reasonably have been anticipated and feared would follow from the speaking of the words, not what would reasonably follow, or we might think ought to follow. In *Vicars v. Wilcocks*,<sup>4</sup> I must say that the rules laid down by Lord Ellenborough are too restricted. That which I have taken from Mr. Justice Christian seems to me, I own, correct. I cannot agree that the special damage must be the natural and legal consequence of the words."

[BRETT, J. That view does not appear to have been assented to by the majority of the judges.] *Cur. adv. vult.*

Jan. 20. The judgment of the court (Lord Coleridge, C. J., and Keating, Brett, and Denman, JJ.), was delivered by

LORD COLERIDGE, C. J. In this case time was taken to consider our judgment, from the wish entertained by at least one member of the court to hold, if there were authority for the proposition, that a statement false and malicious made by one person in regard to another, whereby that other might probably, under some circumstances, and at the hands of some persons, suffer damage, would, if the damage resulted in fact, support an action for defamation. No proposition less wide in its terms than this would support the present declaration; for to call a man "the ringleader of the nine hours system," and to say of him that he "had ruined a place by bringing about that system," could not under many circumstances and at the hands of many people do the subject of such statement any damage at all. But we are unable to find any authority for a proposition so wide and general in its terms as would alone support this action.

The rule, as laid down by De Grey, C. J., in *Onslow v. Horne*, that

<sup>1</sup> 9 H. L. C. 577, at p. 583.

<sup>2</sup> 9 H. L. C. at p. 600.

<sup>3</sup> See 4 Irish Jur. n. s. 284.

<sup>4</sup> 8 East, 1.











words are actionable if they be of probable ill consequence to a person in a trade or profession, or an office, is expressly disapproved of by the Court of Exchequer in *Lumby v. Allday*. Bayley, B., there says: "Every authority which I have been able to find either shows the want of some general requisite, as honesty, capacity, fidelity, or the like, or connects the imputation with the plaintiff's office, trade, or business." In that case, the words proved were a very strong imputation on the morality of the plaintiff, who was a clerk to a gas company. But the court held them not actionable, because the imputation conveyed by them did not imply the want of any of those qualities which a clerk ought to possess, and because the imputation had no reference to his conduct as clerk. That case and the language of Bayley, B., in delivering the judgment of the court, have since been repeatedly approved of, and are really decisive of this case.

The words before us are not actionable in themselves. No expression in them was argued to be so except the word "ringleader;" and, as to that, it is sufficient perhaps to say that Dr. Johnson points out the mistake of supposing that the word is by any means necessarily a word of bad import; for, amongst other authorities, he cites Barrow as calling St. Peter the "ringleader" of the Apostles.<sup>1</sup> Neither are the words connected with the trade or profession of the plaintiff, either by averment or by implication; so that, on neither ground can the declaration be supported. There is no averment here that the consequence which followed was intended by the defendant as the result of his words; and therefore it is not necessary to consider the question which was suggested on the argument, whether words not in themselves actionable or defamatory spoken under circumstances and to persons likely to create damage to the subject of the words, are, when the damage follows, ground of action. The judgment of Lord Wensleydale in *Lynch v. Knight*<sup>2</sup> appears in favor of the affirmative of this question. But it is not necessary for us, for the reasons given, to express any opinion upon it; and upon this demurrer there must be judgment for the defendant.

*Judgment for the defendant.*

<sup>1</sup> "It may be reasonable to allow St. Peter a primary of order, such a one as the ringleader hath in a dance." Barrow's *Treatise of the Pope's Supremacy*, Oxford edition of Works, 1830, vol. vii. p. 70. In Fox's Preface to Tyndall's Works, "these three learned fathers of blessed memory, William Tyndall, John Frith, and Robert Barons," are styled "chief ringleaders in these latter tymes of thys Church of England."

<sup>2</sup> 9 H. L. C. at p. 600.















